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"A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably or usefully employed than in examining the laws and customs of foreign nations."

Samuel Johnson

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THE LATE MR. C. E A. BEDWELL

THE LATE MR. C. E. A. BEDWELL

1878-1950

THE Society has received the following tributes:

IN the distinguished assembly which gathered in the Hall of the Middle Temple on the evening of July 18 last, when the Society of Comparative Legislation entertained as their guests the members of the Executive Council of the International Bar Association, we were sadly conscious of the absence of one figure. To no one could the success of the occasion have given more gratification than to Mr. Bedwell, who had planned it with all his wonted efficiency and enthusiasm. But just three months before, on April 24, he passed away, to the deep regret of his many friends. By his death the Society has indeed suffered a grievous loss. For thirty-three years he rendered most valuable service to it as its honorary secretary and his association with this Journal first began some years earlier as its assistant editor.

Mr. Bedwell's interpretation of the duties of his post far transcended the performance of the mere office work of the Society, and it is no exaggeration to say that it was the absorbing interest of his life. He was constantly on the alert to seize every opportunity of extending its usefulness and enhancing its reputation. To him is in no small measure due the assured position which it now occupies among the learned societies of the legal world. This Journal was his especial concern and successive editors can testify to his unremitting zeal in maintaining his high quality.

There is a cynical French saying that no man is necessary and the Latin poet assures us that *uno avulso non deficit alter,* but some losses are well nigh irreplaceable. The Society which has sustained such a loss in the death of Mr. Bedwell will best honour his memory by endeavouring to maintain the high standard which he set for it. That is what he would himself have wished.

MACMILLAN.

IF our Journal has now established itself with a permanence for which, according to Sir Courtenay Ilbert, the founders of our Society hardly dared to hope, it is Bedwell more than anyone else who should have the credit for that success. For more than a generation he competently managed the mechanics of its publication and supervised the business side of our operations, giving help to editors in trouble, writing many a paragraph himself and applying, as some of us have cause to remember, the needed stimulus to laggard contributors.

Starting with no qualifications or training in either, he came to discharge responsible duties in connection with two great professions. In 1909, after ten years' experience as assistant librarian, he was appointed Keeper of the Library of the Middle Temple. A few years later he produced a catalogue of its printed books. On retiring from the Keepership in 1921 he received the high compliment of being made an honorary member of the Inn. His intimate acquaintance with legal literature and institutions showed itself in his occasional writings. An article on the Inns of Court in the Quarterly Review of 1944, for instance, contained informative comments on legal education and the best use of law libraries. The law, however, was not his sole preoccupation. On quitting the Middle Temple Library he laboured for nearly twenty years as House Governor and Secretary to King's College Hospital. These dual professional interests united to make him a keen and useful member of the Medico-Legal Society.

More might be said of his other activities such as his contributions to the Dictionary of National Biography. In the present context it must suffice to recall his long years of devoted work as honorary secretary to our Society and the care and success with which he protected its affairs and possessions amid the difficulties, the all too present dangers and the migration which two World

Wars involved. His place will be hard indeed to fill. Many friends at hom and overseas will miss him sadly, but his work will survive for his memorial.

CECIL T. CARR.

AFTER leaving school Mr. C. E. A. Bedwell's early years were spent in business in a paper merchant's establishment and, in 1898, he joined the staff of th Middle Temple as Assistant Librarian, after receiving a short intensive trainin at the hands of the then Assistant Librarian of the Inner Temple. After eleve years in this capacity he succeeded, in 1909, to the Librarianship, upon th retirement of Mr. John Hutchinson. In that year he published "A Brief Histor of the Middle Temple," which met with a fair measure of success. In 1914 Mr Bedwell was responsible for compiling a new Catalogue of the Library of th Middle Temple, consisting of two volumes of Author Catalogue and one volum of Subject Index. This work is recognized as being a model of what such a catalogue should be and, although it has been added to by a Supplement published in 1926, and by entries since then, it still forms the basis of th catalogue in use today in that Library. Bedwell's general administrative abilit was reflected in the growth and usefulness of the Library during his tenure o office. From a collection of about 40,000 volumes he built a first-class Lega Reference Library of 60,000, and when, at the end of the year 1921, he left t become House Governor of King's College Hospital, the Bencher of the Middl Temple admitted him as a Member of the Inn, without fee, as a mark o appreciation of his services to the Hon. Society.

H. A. C. STURGES.

WHEN Mr. Bedwell became the House Governor of King's College Hospital i 1921 at the request of the Committee of Management, he had already served for a time on that Committee, so that he was not entirely a stranger to the peculiaritie and difficulties of hospital routine and administration.

He forthwith resigned his appointment as librarian of the Middle Templ and was thus free to devote the major part of his energies to his new post—on says major part advisedly because a man with such energy and wide interest could never be wholly bound up in one activity.

He had at the outset one admirable advantage to bring to his new work. H had always been a resident of South London and thus knew the district and it people intimately and had a very affectionate regard for their qualities and a good humoured sympathy for their weaknesses. To this he very soon, thoug involuntary, added another advantage—he broke a leg and became a patien in the hospital. Seldom can there have been a more apt illustration of th truth that much good may come from misfortune, for having seen hospital lif from the patient's angle in his own hospital, he ever afterwards viewed it administration with the patient foremost in his mind. Indeed, that was th outstanding quality that impressed all who came into contact with this side of hi work, not just that the patient must not be lost sight of, but that he came first

A large number of people came to regard him as the extremely abl administrator he undoubtedly was, but few realized, and only then if they ha personal contact with him, of his thought for the individual in addition to hi wide grasp of broad and collective issues. He was able to impress the staff fo which he was responsible, with the inestimable advantages first of all of punc tuality, so necessary in a hospital, and then of method, without which the bes ideas of administration may fail. He did this without ever bludgeoning hi views and personality on his staff but by personal example and a careful under standing of the individual. He never discouraged initiative and a desire fo responsibility, but rather inspired them. No one who has ever had the privileg of working for him and under him can ever forget the experience or have faile to assimilate something of his devotion to his task, his methods of facing problem and his broad sympathies. In addition his acute sense of humour, which neve

seemed to fail him was a joy to those who worked intimately with him. To all these qualities must be added a keen perception of the qualities in others and a peculiar forthrightness in using them not only to both his and the other's best advantage, but also for the common good.

Mr. Bedwell retired in 1939, but throughout the war and until 1948 he continued to serve on the Committee of Management where his experience and wisdom were invaluable.

[Mrs.] M. Glen Haig.

DINNER OF THE SOCIETY

July 18, 1950

The presence in London this summer of a considerable number of distinguished overseas members of the Society, and the occasion of the third congress of the International Bar Association combined to make July 18 a most fitting opportunity for the Society, not only to bring together a very representative gathering drawn from its own widely dispersed membership, but also to extend to the Executive Council of the International Bar Association and other notable guests, together with their ladies, the traditional hospitality of the English Inns of Court, in the fullest measure that post-war conditions allowed. It was equally fitting that, by the kind courtesy of the Masters of the Bench of that Inn, the Society's Dinner was held in the Hall of the Middle Temple, not so long restored following the devastating effects of enemy bombing.

The assembled company of some two hundred persons were received by the President, the Chairman, the Vice-Chairman and their ladies in the beautiful Smoking Room, the Parliament Chamber and the Queen's Room looking down over Temple Gardens to the Thames. A half hour later as the brilliant light of high summer began to fade, they moved into the torchlighted Hall for Dinner. The lingering daylight, through the great window at the west end, continued to illumine the Hall, filled now to capacity. Its last rays were still discernible even though it was by then half past ten, as the Lord Chancellor rose to speak and thereby to provide the climax of the evening.

It was indeed a happy occasion. Conversation in many tongues and on many topics, broken only by pleasant laughter, came all evening from all round the Hall, renewing old friendships and creating new ones. While, on the English side, the Society was greatly honoured by the presence, with their ladies, of the Lord Chancellor, the Lord Chief Justice, Viscount Simon, Lord Porter, the Master of the Rolls, the Chairman of the General Council of the Bar, the President of the Law Society and of many other distinguished representatives of the legal profession and of other walks of life, it was also a particular pleasure not only to entertain the distinguished Council of the International Bar Association, but to welcome at the same time notable guests and members from so many countries of the world, not least among them the representatives of our sister Society in France, the Société de Législation Comparée.

Lord Justice Cohen, the Chairman, proposing the toast of "The International Bar Association and other guests," spoke of the importance of the association's work, particularly in the field of Comparative Law, and of the presence of many notabilities, including prominent legal figures from abroad. "I must not delve into politics," he said, "but I cannot see how our statesmen are going to deal with the kind of problem which faces them at such bodies as the Council of Europe unless they number among their advisers men who study comparative law and know something of the law in force in the countries with which they have to deal." In naming various notable guests, he said, "When I speak of France, I cannot help thinking that the members of the English bar, including the Chairman of the General Council of the Bar, might think it well if my colleagues and I in the Court of Appeal extended our researches in comparative

law into the practices of our opposite numbers in France, for I understand it is a rule of judicial conduct that in no circumstances shall any of the judges interrupt the argument of counsel''—(laughter).

Mr. George M. Morris (Speaker of the House of Deputies, International Bar Association), responding, recalled that twenty-six years ago he had stood as a boy in the Hall of the Middle Temple—or rather its predecessor—and learned the hospitality of the English bar for foreign visitors. He spoke with feeling of the destruction of the original hall, now so admirably restored. Referring to the spirit which moved members of the International Bar Association—whom he described as ''the common people'' and ''the troops''—Mr. Morris said they had the feeling that by bringing together men of such spirit and attitude they might do something for the struggle of securing universal peace. ''God knows, universal peace as an objective needs all the aid that any group of men can bring to it,'' he said. The man of the legal profession was concerned with two things:—(1) What are the facts? (2) What is the rule which in the interest of society we must apply to the facts? Lawyers were much the same in the countries he had had an opportunity of visiting. They came from all ranks of society. They followed the old saying about members of the legal profession:—''They work hard, they live well, they die poor.''

Monsieur Julliot de la Morandière (Dean of the Faculty of Law, Paris), responded in French. ''C'est extrêmement impressionnant de parler dans cette splendide salle qui évoque tout le passé de l'Angleterre. Je crains d'être troublé par l'ombre de la reine Elizabeth ou par le souvenir de Shakespeare qui, dans cette salle même, évoquait les parfums de la nuit. Après un poète, un juriste, c'est une décadence. D'ailleurs l'art du toast est un art spécifiquement anglo-saxon. Cela me remet en mémoire l'histoire que vous connaissez tous, que je me permets cependant de vous redire, de ce pauvre condamné qui devait être mangé par un lion. Le lion s'approche, le condamné lui dit quelques mots et le lion se retire sans le manger; un second lion, un troisième lion, c'est la même chose. L' empereur demande alors au condamné: 'Qu'est-ce que tu lui as dit?—Je lui ai dit: 'Tu vas me manger, mais après, il faudra faire un toast!' Je ne veux pas me comparer à un lion. Je n'en ai pas la crinière, je n'en ai pas la cruauté. Nous avons un seul point en commun, mon prénom est Léon.

''Mais j'ai pris un dîner et un excellent dîner; je suis bien obligé maintenant de faire un toast. Je le fais d'ailleurs avec plaisir et de tout mon coeur.

''C'est avec grande émotion que je remercie la Société de Législation Comparée d'Angleterre. C'est pour nous une occasion de redire l'émotion qui nous saisit lorsque nous venons maintenant à Londres, la cité héroique d'où, pendant la guerre, alors que nous succombions sous la botte de l'envahisseur, nous sont venues les premières paroles d'espoir. Londres, que nous entendions le soir à la radio et qui ranimait notre courage. Et c'est un bonheur de constater que si Londres a été héroique dans la guerre, la ville est héroique dans la paix. Vous mettez des fleurs dans les ruines et vous les réparez. A chaque voyage nous constatons la renaissance de la Grande Angleterre.

''Et c'est une joie tout particulière, pour moi juriste, de me trouver dans cette belle Ecole de droit. Si je prends le programme des réjouissances d'aujourd'hui, quels sont les témoignages de satisfaction que je n'ai pas? J'en ai deux en particulier; voyez la liste des membres du dîner de ce soir. Il y a des professeurs, il y a des juges, des avocats, des membres de toutes les carrières juridiques. Je ne suis pas absolument sûr qu'en France il serait possible de les réunir ainsi. Du moins, il y a quelques années, c'eût été très difficile. Il y avait en France séparation entre l'Ecole et le Palais. L'école, les professeurs, méprisaient les hommes de pratique, les accusaient de se complaire dans leur routine et les hommes de pratique leur rendaient leur mépris en leur disant: 'Messieurs les professeurs, vous vivez loin de la vie, c'est nous qui faisons le droit.' A l'heure actuelle, les choses sont différentes. L'école et le Palais sont rapprochés. Il est impossible qu'il en soit autrement. Il faut se pencher sur la pratique et

dégager les principes. Mais les principes doivent être pris dans la vie et le fossé qui sépare l'école du Palais doit être comblé.

"La seconde joie, qui est grande, est celle que signalait M. Morris; c'est celle de voir des personnes de toutes les nationalités, de toutes les spécialités juridiques. Le droit comparé est devenu à l'heure actualle une discipline indispensable qu'on le veuille ou non. Ce sont les choses mêmes qui nous y entraînent. Les peuples ne vivent pas isolés, ils sont solidaires les uns des autres. Le juriste pratique a besoin de connaître le droit étranger et le théoricien voit qu'il n'y a pas seulement des différences mais des éléments de similitude. Il s'agit de dégager, précisément par la confrontation des différentes lois, les principes qui leur sont communs. Les problèmes qui nous agitent en Europe ou aux Etats-Unis sont les mêmes. L'homme doit nécessairement faire partie de ces grandes organisations qui permettent le développement de la production. Mais alors, le problème qui nous inquiète tous est celui de savoir comment, dans ces organismes, conserver la liberté."

Mr. Amos J. Peaslee (Secretary-General, International Bar Association), proposing the toast of "The Society of Comparative Legislation," said, "In the field of international law Britain, I think we may fairly say, has led the world during the last half-century in the development of quite a new concept—that a breach of the public peace is the concern of the entire community." He added, subsequently, "Twice within the memory of most of us Britain has led the world in expressing and defending that concept on the international scale." Speaking of his own country, he said, "We know that Britain and all peace-loving nations will stand shoulder to shoulder with us in seeing the restoration of order in the world, which is the foundation of liberty and justice."

Lord Macmillan, the President, responded in a speech not less full of wit than it was of loving-kindness. Reflecting on the long history of successful work which the Society could record, he revealed that plans were afoot for fresh developments and new forms of activity. It was fitting that in this year the Society should pause to assess its past in preparation for its assault on the future.

Sir Cecil T. Carr, proposing the toast of "Statute Law Revision," recalled that we still had among our living statutes some fragments dating back to 1235. There were many incredible survivals. He understood that it was a law in Scotland that if people were playing cards and if the householder himself did not sit down to play it was an offence. That was brought to the attention of the authorities in 1934, but he believed it remained untouched. By 1948 there was still on the Statute Book a law which said that nobody must practise in London or for seven miles around either as a physician or surgeon unless he had been examined and approved by the Bishop of London or the Dean of St. Paul's. "I think it is true to say that there never has been in living memory so strong a movement to improve the laws of this country as there has been under the direction of the present Lord Chancellor," he said. "Were it not for his personal initiative, perseverance and drive we should not have the prospects to which we now look forward."

The Lord Chancellor, responding, said amid laughter that on the subject of statute law revision he ought to speak for at least an hour-and-a-half. He aroused further laughter when, referring to their good fortune in having the ladies with them, he said, "Whether they care much about statute law revision or feel very acutely about it I don't know," adding, "I suspect that there is no topic of law reform which is half so important as reform of the lawyers, but I don't see any prospect of reform of the lawyers." He went on, "Perhaps, if you want to understand something about our system of law you must understand something about our history. There is no place which better enshrines the history of law than this hall." On the subject of law reforms, he reminded his listeners of the veneration we had in Britain for our old traditions, and emphasized that it had to be remembered that we had had no really violent disturbances in our life since the Norman Conquest. In an aside he mentioned as a possible

exception "that little interlude" in which Cromwell was concerned. Referring to Sir Cecil Carr's comments on some of the old survivals in our law today, he recalled that there was a statute of some importance passed in 1215 which the Master of the Rolls still had in his custody (he believed). Reverting to law reform, the Lord Chancellor said it was with tradition that one had to work. Therefore it was essential that there should be no violent change. It must be an orderly process of development. He was glad to think that he had been able to play a small part in this matter. "The real art of occupying my position is to delegate all the difficult duties," he continued, amid laughter. "It is hopeless to think that any one man can do all the things I have to do. The only thing that I can do is to show a certain amount of low cunning in selecting the right men to do the work and then give them their heads." He went on, "I am not prepared to support a general code such as the French have, because I don't think that it fits in with our tradition. I think, on the other hand, that the code tends to produce a certain element of rigidity; we prefer our existing system with the great reservoir of common sense enshrined in the common law to make up for the deficiencies." He was going to issue this year a new edition of the statutes, a work that had been held up very badly in the past by two world wars. He drily added that the relevant statutes would be contained in only thirty-two volumes as against fifty-seven. In the meantime the work of consolidation went on. He was producing almost every day bills to consolidate certain parts of the law. It was a highly technical work and one must have very skilled people doing it. The ordinary Parliamentary draftsmen were far too busy on everyday work to give their attention to it. Next year he hoped to have a bill consolidating income tax, customs and excise and summary jurisdiction. They would know that that involved a most immense task.

THE CENTRAL LEGAL OFFICE FOR THE BRITISH ZONE OF GERMANY

[*Contributed by* H. P. Romberg, Esq.]

I.

With the formation of a German Federal Ministry of Justice, the coming into force of the Basic Law and the promulgation of the Occupation Statute, the Germans themselves will become entirely responsible for the German Legal Administration. Thus comes to an end a unique epoch in German Legal History. During the four years that have passed since the beginning of the occupation, the German courts and legal administration have gone through a development which, in England, took many centuries. To the British observer it was like a "time-raffer-film" which concentrated many centuries of legal history into four years.

When the Occupation Forces entered Germany, all German courts were closed and legal administration had come to a complete standstill. It was then decided to rebuild the courts from the bottom. At first the Magistrates' Courts (Amtsgerichte) were reopened, sometimes under the greatest difficulties. Later the High Courts (Landgerichte) were opened and during the winter of 1945/46 eight Courts of Appeal (Oberlandesgerichte) were established in what is now the British Zone. The President of each Court of Appeal was in charge of his own and all inferior courts in his district, and also had certain legislative powers. Very soon, however, it was discovered that it was most inadvisable that there could be eight different laws on the same subject in the British Zone. It was particularly important in the field of criminal legislation that there should be uniformity. It was obviously ridiculous to have a criminal law in Hamburg which was different from that in Schleswig-Holstein, and one must not forget that up to 1945 Germany had had a uniform criminal law, so that the new development was definitely retrogressive.

Although there are strong federalistic tendencies in the Germany of today, all lawyers and the great majority of politicians agree that the criminal and civil law should be uniform. It has always been the policy of the Legal Division of the Control Commission to further this uniformity of laws, and as early as spring, 1946, Military Government considered how this aim could be achieved. It was then decided to establish the Central Legal Office for the British Zone. No such office exists in the American or French Zones.

There were, of course, other reasons for establishing this office. It was necessary to introduce amendments to certain criminal and civil laws owing to the changed circumstances of post-war Germany, and in order to eradicate the effects of the Nazi regime; this legislation was the task of the Central Legal Office. The approval, however, of Military Government was necessary to each ordinance.

In addition to these legislative powers, the Central Legal Office was made responsible for the appointment of certain Senior Judges and Prosecutors, altogether about one hundred and twenty appointments. This power was given to the Central Legal Office in order to avoid political influence in the appointment of Senior Legal officials, and also in order to extend the field of choice for such appointments beyond the boundary of the individual Laender. (Such rights of appointment will now go to the Ministers of Justice in the Laender in the British Zone.)

Generally speaking, legal administration was not a matter for the Central Legal Office but for the Ministers of Justice in the Laender. In the British Zone there are three Laender, each with a Ministry of Justice: North-Rhine/Westphalia, Lower Saxony, Schleswig-Holstein. The Hansestadt Hamburg has the standing of a Land. It has no Minister of Justice. The functions of the Ministry of Justice are vested in a Committee of members of the Senate.

The Central Legal Office had in fact, however, also a great influence on the administrative side, especially as the President of the Central Legal Office organized regular meetings of all the ministers and was usually the chairman of such meetings. It was also found advisable that certain administrative functions which applied to the whole Zone should be taken over by the Central Legal Office. In the course of time twenty-six such additional duties were given to the Central Legal Office, e.g. Legal Aid with Foreign Countries, which is already quite considerable, there being an average of four hundred requests per month.

The Central Legal Office has published a number of booklets, and above all a legal gazette, the *Verordnungsblatt,* running to about 16,000 copies per issue. It appeared three times a week and contained all laws (Military Government Laws and German Laws) concerning the British Zone. It also published a monthly periodical (*Zentraljustizblatt*) which contained interesting articles and important decisions of the Court. Oddly enough, it is quite customary in Germany for the draftsman to publish an article in which he explains the history of an ordinance and the reason for drafting it in a special way. In addition to the many tasks of the Central Legal Office which accumulated in the course of time, it had to advise the German authorities and various branches of the Control Commission on German laws and procedure.

II.

Organization of the Central Legal Office.

The Central Legal Office was established on October 1, 1946, by Military Government Ordinance 41. The German title was *"Zentraljustizamt für die Britische Zone."* As seat of the Central Legal Office, Hamburg was chosen because it was the biggest town in the British Zone, and also because there are in Hamburg several big legal libraries. As President of the Central Legal Office, Military Government appointed Dr. Wilhelm Kiesselbach. Perhaps he is best known in this country for his work on the "Claims Commission in America" after the First World War. He was also President of the Court of Appeal of Hamburg until 1933, when the Nazis relieved him of his office. With his eighty-two years,

which he carries well, he is the doyen of the German judiciary. His great reputation and tact did much to ensure the smooth co-operation between the Central Legal Office and the Ministers of Justice.

Ordinance 41 laid down that the office should consist of the following three departments:

(*a*) *The Presidential Department.*

This department, under the supervision of Vice-President Dr. Ekhard Koch, was responsible for the appointment of the one-hundred-and-twenty highest legal officials in Germany. Very careful records are kept regarding every legal official (Personal *Akte*), and such a personal file records all major events of his career from the first examination at the university until his retirement from office; it gives detailed information, even about "wife's father's occupation" and "progress at school of children." These personal files used to be kept by the former Reichs-Ministry of Justice, and they were taken over and maintained by the Central Legal Office. They number at present 50,000.

(*b*) *Criminal Department.*

This Department was responsible for the initiation and promulgation of criminal law and criminal procedure and juvenile law.

In the field of criminal law the German lawyers were faced with problems more difficult than any problem which had to be solved by any previous generation. For instance, the German criminal code and all other laws had to be purged of all vestiges of the Nazi regime, but it was, of course, sometimes very difficult to decide in a particular case whether the law was tainted by Nazi ideology or not. Many difficult problems were created by Control Council Law No. 10, which made "crimes against humanity" punishable.

The work of ridding the German law of the Nazi influences has, of course, not yet been finished, but the contribution of the Central Legal Office in this field was very remarkable.

(*c*) *The Civil Department.*

The Civil Department dealt with Civil Law and Procedure, Law of Status, Company Law and similar subjects. This department had to legislate on a wide range of subjects from mortgage deeds to presumption of death.

Not part of the Central Legal Office, but attached to it, was the Office of the General Inspector which was made responsible for what is generally called "Operation Old Lace," which is the trial of members of those organizations which were convicted by the Nuremberg judgment. Special German tribunals were established for this purpose, and in the course of about two years more than 27,000 persons were tried. In February, 1949, the Lord Chancellor, in a letter to Mr. Bevin, called this the "most remarkable achievement in the whole of my legal experience."

III.

General Survey

As we have seen, the President of the Central Legal Office exercised powers which in England are vested in various offices, such as the Lord Chancellor's Office, the Parliamentary Counsel's Office, the Home Office, and the Houses of Parliament. It is, therefore, easy to understand that the staff of the Central Legal Office grew rapidly, and although every effort was made to economize, it consisted finally (not counting the office of the Inspector General) of thirty-four legal officials and ninety-eight employees. Although it had at its disposal funds to the amount of DM. 1,000,000 a year, it managed to keep its expenditure down to DM. 800,000. It may be added that the Central Legal Office received about 2,300 letters a month.

It was the policy of the President of the Central Legal Office to legislate as

little as possible and to leave legislation as far as possible to a future Federal Government. Even so, the number of Ordinances promulgated increased from twelve in 1946, to forty in 1947, and to sixty-two in 1948. (In 1949 the first few months, twenty-six ordinances were promulgated.) In addition to this, the Central Legal Office issued a great number of important general instructions.

Members of the Central Legal Office always felt it as a great disadvantage that, owing to the absence of a Federal Government, they had no proper democratic backing. To overcome this difficulty, drafts of all proposed Central Legal Office ordinances were sent for scrutiny to the Land Governments. There was also close contact with the Bizonal Offices in Frankfurt.

All the ordinances had to be approved by the Legal Adviser to the Military Governor, who always obtained the concurrence of Political Division. It must be stressed that the Central Legal Office was established as a German and not as a Military Government Office. However, the co-operation with the office of the Legal Adviser was very close. There was a permanent Liaison Officer with the Central Legal Office, who acted as a link between the President of the Central Legal Office and the Legal Adviser to the Military Government. This co-operation functioned without any friction or major difficulty, partly because lawyers of all nations have something in common, and partly because the aim of all concerned was the same: to rebuild the German legal administration on democratic lines.

There is in Germany at present a tremendous interest in the English legal system and English ideas. It has never been the policy of Legal Division to introduce the English system into Germany, but the policy was rather to tell leading German lawyers about English legal institutions and to let them choose whatever they thought worth adopting in Germany. The members of the Central Legal Office have always shown great interest in the English legal system, and some English ideas have filtered through the Central Legal Office into German laws. Other ideas (e.g. "contempt of Court") have not yet been adopted, but have been made widely known to the German public and may be adopted at a later stage.

With the formation of the Federal Ministry of Justice the Central Legal Office has fulfilled its task. It is a matter of great satisfaction to all who planned it more than three years ago that, under the new Basic Law, the Federal Ministry of Justice will deal with almost exactly the same subjects as did the Central Legal Office. Only "penal matters" are now added as a new subject. (See Article 74 of the Basic Law.)

Pehaps it is too early to judge the influence and the work of the Central Legal Office, but certainly great credit is due to the men who have achieved so much, often under most difficult circumstances. This was very well expressed in the letter from the U.K. High Commissioner, General Sir Brian Robertson, to the President of the Central Legal Office, in which he said:

> "I am sure that your work will be recognized as having contributed greatly to the establishment of a strong and independent judicial system throughout Germany, in that way going far to ensure sound democratic Government."

FOREIGN ELEMENTS IN ANCIENT ISLAMIC LAW [1]

[*Contributed by* Joseph Schacht, Esq.]

So much has been written on the problem of foreign elements in ancient Muhammadan law, and with so little result, that to discuss the subject afresh can be justified only if the author adduces new relevant facts or brings new light to bear

[1] A French version of this paper, slightly shortened, was read to Section I(D) of the Third International Congress of Comparative Law, London, August, 1950.

on the elements of the case.[2] At first sight it might seem surprising that one should look for foreign influences in a legal system that unmistakably bears the stamp of uniqueness.[3] But the fact that many prominent features of Islamic civilization, notwithstanding a deceptive Arab appearance, turn out to be borrowings from the Hellenistic and the Iranian world, to mention only these two, poses the question, though without prejudice as to its answer, of similar conditions in the field of law.[4] Furthermore, the riddle of the origins of Muhammadan jurisprudence, once the obviously artificial theory of the Muhammadan lawyers was disregarded, seemed to postulate the unknown quantity of foreign influences as the easiest explanation. The difficulties inherent in both problems, the problem of origins and the problem of foreign elements, have lately been reviewed by Professor Bousquet in a paper in which he aptly speaks of the mystery surrounding the genesis of Muhammadan legal science.[5] A solution of this mystery, such as I have attempted in my forthcoming book on *The Origins of Muhammadan Jurisprudence*,[6] will, I hope, enable us to approach the problem of foreign elements in ancient Islamic law from a new angle.

There are four legal systems whose influence on nascent Muhammadan law and jurisprudence is at least possible: Persian Sassanian law, Roman Byzantine (including Roman provincial) law, the canon law of the Eastern churches, and Talmudic law. Outside the sphere of law proper, the far-reaching influence of Judaism and Christianity on Islamic cult and ritual, and that of Roman Byzantine and Persian Sassanian administration on Islamic political and fiscal institutions are matters of common knowledge. It is important for our purpose to realize that these foreign elements have been so thoroughly assimilated and Islamicized that, taken in their ordinary Islamic setting, they hardly seem to reveal a trace of their foreign origin. What was possible here, was possible also in the sphere of law proper, and the difference between the spirit of Islamic law and the spirit of Roman law, for instance, which is indeed striking, does not in itself preclude the possibility of more or less extensive influences.

Of the four legal systems mentioned, very little is known of Persian Sassanian law, so that the question of its influence on ancient Muhammadan law has remained purely hypothetical. The question of a possible influence on the part of the canon law of the Eastern churches has hardly been studied by specialists so far. Influences of Talmudic on ancient Islamic law, on the contrary, have often been pointed out and are easy to account for;[7] the spirit of both systems, too, is similar. As regards the relations between Roman and Islamic law, a number of parallels have been established which are too numerous and too striking to be coincidences.[8] Most of these parallels concern individual rules and whole institutions of positive law, and these can be explained as the natural result of the continuation of legal and commercial practice in the territories conquered by the Saracens, just as ancient Arab legal and commercial practices survived into Islamic law. The principle of the continuation of pre-Islamic legal institutions under Islam is explicitly stated in a passage in Baladhuri which reads:[9] "Abu

[2] For bibliographies, see F. Köprülü, art. *Fikih*, in *Islâm Ansiklopedisi*, part 36, Istanbul, 1947; G.-H. Bousquet, in *Bulletin des Etudes Arabes*, viii, No. 36, Algiers, 1948.

[3] See J. Schacht, *G. Bergsträsser's Grundzüge des islamischen Rechts*, Berlin and Leipzig, 1935, p. 2.

[4] On the non-Arab character of Islamic civilization, see C. H. Becker, *Islamstudien*, i, Leipzig, 1924, pp. 14 ff., 28 ff.

[5] *Le mystère de la formation et des origines du fiqh*, in *Revue Algérienne, Tunisienne et Marocaine de Législation et de Jurisprudence*, lxiii, part 1, Algiers, 1947, pp. 66-80.

[6] Clarendon Press, 1950.

[7] Cf. Bousquet, *Le mystère . . .*, p. 76 f.; Bergsträsser, in *Der Islam*, xiv, 81.

[8] We are not concerned here with assessing the extent of the borrowings which Islamic law may have made from Talmudic and from Roman law, but with investigating the problem of whether such borrowings, as far as legal science is concerned, may possibly have taken place.

[9] *Liber expugnationis regionum*, ed. de Goeje, Leiden, 1865, p. 448. Baladhuri died in A.H. 279.

Yusuf [d. 182] held that if there exists in a country an ancient, non-Arab normative custom (*sunna*) which Islam has neither changed nor abolished, and people complain to the Caliph that it causes them hardship, he is not entitled to change it; but Malik [d. 179] and Shafi'i [d. 204] held that he may change it even if it be ancient, because he ought to prohibit [in similar circumstances] every lawful normative custom which has been introduced by a Muslim, let alone those introduced by unbelievers."

The parallels between Roman and Islamic law, however, are not restricted to rules and institutions of positive law; they occur in the field of legal concepts and principles,[10] and extend even to fundamental ideas of legal science. Goldziher has repeatedly and forcefully drawn attention to this fact and made a case for admitting an influence of Roman on Islamic law in all these respects.[11] In one of his contributions on points of detail, he established the relevant fact that parallels between Roman and Islamic law in the field of legal science are usually doubled by parallels in Talmudic law.[12] Though some of his comprehensive statements are now dated, and much more material on the origins of Muhammadan law is available now than when they were written, Goldziher's considered and consistently held opinion commands serious attention. Considerations of this kind, however, were destined to lead to a seeming impasse—not indeed the thesis of Goldziher himself, who at the same time developed his masterly and still valid method of investigating the early history of Muhammadan law and jurisprudence and using its sources critically, but the conclusions of later scholars who had not completely given up the traditional opinion of that development, an opinion which in the light of Goldziher's method could be seen as lacking all foundation, or whose assumptions even tended to minimize the implications of that method. This impasse can briefly be described as follows.

According to the current opinion,[13] the foundations of Muhammadan law and jurisprudence were laid in Medina in the first century of the Hegira by persons who applied religious norms, such as those expressed in the Koran and in "traditions" from the Prophet, to the customary law of Medina. This would imply not only that a certain body of "traditions" purporting to relate the words and actions of the Prophet existed at that early period, but that the "traditions" relating the opinions and decisions of the "Seven Lawyers of Medina" and other authorities of the first century A.H. are authentic. Whereas it is agreed that the pre-Islamic customary law of Medina is likely to have contained many foreign, and in particular Roman provincial elements, it is difficult, if not impossible, to imagine the introduction of concepts and rules pertaining to Roman legal science into early Islamic law in these circumstances. To quote an example adduced by Bergsträsser: there occurs in Islamic law the equivalent of the Roman concept of *quæ pondere numero mensura constant,* and this Islamic concept occupies a key position in the law of sale. But it occurs already, albeit without the factor of *numero,* in the doctrine ascribed to the ancient Medinese lawyer Sa'id b. Musaiyib who died A.H. 93 or 94. Is an influence of Roman legal science on a pious worthy of Medina in that early period historically possible? There is no doubt that it is not.[14]

This argument was taken one step further by C. A. Nallino who, by more logical than historical reasoning, attempted to show that any important influence

[10] Cf. F. F. Schmidt, in *Der Islam,* i, 300 ff.; Bergsträsser, loc. cit.

[11] *The Origins of Muhammadan Jurisprudence* (in Hungarian), in *Proceedings of the Hungarian Academy, Class of Linguistics and Moral Sciences,* xi, No. 9, Budapest, 1884; *Muhammedanische Studien,* ii, Halle, 1890, p. 75 f.; *The Principles of Law in Islam,* in *The Historians' History of the World,* viii, New York, 1904, p. 294 ff.; art. *Fikh,* in *Encyclopædia of Islam,* ii, Leiden and London, 1927.

[12] In *Vienna Oriental Journal,* i, 229, 231, 233.

[13] This paragraph is based on Bergsträsser's stimulating paper *Anfänge und Charakter des juristischen Denkens im Islam,* in *Der Islam,* xiv, 76 ff.

[14] That Abu Hanifa (d. 150) in Iraq should have consciously followed the stream of Roman legal thought, as F. F. Schmidt suggested (loc. cit.), is of course equally untenable.

of Roman on ancient Islamic law was impossible and therefore non-existing.[15] Nallino's essential argument is as follows (with my remarks in brackets). According to him, at least the outlines of a great part of the Islamic law of property must have existed already among the people of Hijaz long before Muhammad. (This assumption exaggerates Bergsträsser's remark that Arab customary law in the time of Muhammad cannot have been primitive. Whether this customary law as such was identical with the raw material out of which Muhammadan law formed, is the problem under discussion.) This law can hardly have contained Roman elements, says Nallino, because Theodoret, who wrote in the first half of the fifth century A.D., tells us that Roman law was not applicable to the "multitudinous tribes of Ishmael." (But the problem is what happened in the whole of the Islamic empire in the seventh and in the first half of the eighth century A.D.) Nallino thinks that the legal "traditions" from the Prophet are genuine and enable us to reconstruct the pre-Islamic law of property, which according to him contains no Roman traces, in the home country of Islam. (This again exaggerates Bergsträsser's belief in the relatively early date—a thing very different from authenticity—of some legal "traditions." Nallino's whole reasoning concerning legal "traditions" is vitiated by his failure to take into account the earliest groups of these "traditions" which are preserved in Iraqian sources and claim to go back not to the Prophet but only to his Companions.) From the fact that the early Islamic sects, which split from the "orthodox" community about the middle of the first century A.H., have in all essentials the same law as the majority, Nallino concludes that the essential features of this "common" Islamic law were worked out before the schism, and that therefore "the tradition of the existence of the 'Lawyers of Medina' in the generation after that of Muhammad deserves more credit than is generally thought." (I shall deal with the argument taken from the law of the early sects later, and only wish to point out that between the death of Muhammad and the death of the majority of the "Seven Lawyers of Medina," whom Nallino puts into the next generation, there was an interval of 90 years or three generations.) Nallino stresses the fact that a number of important legal concepts and institutions which existed in the Hellenistic world were not taken over by Islam. (This is correct,[16] but does not prejudge the issue in question.)

No one will quarrel with Nallino's vigorous affirmation of the distinctive character of Muhammadan law as an integral part of the all-embracing body of Islamic religious duties, but as I pointed out before, this distinctive character does not preclude the possibility of more or less extensive influences. Nallino is right to put the question, as Bergsträsser had done before him, of the manner in which an adoption of rules of Roman law by the early Islamic lawyers might conceivably have taken place. The solution of the problem which I am proposing here will answer this question.

We are thus faced with the task of accounting for the existence in ancient Islamic law of numerous parallels to Roman law concerning jurisprudence and legal theory, of solving the impasse of the apparent historical impossibility of an influence of Roman on Muhammadan legal science, and of showing, if there was an influence, the manner in which it happened. The answer to these three related questions lies in a new approach to the problem of the origins of Islamic law and jurisprudence. I had occasion before to mention the current opinion concerning those origins and a number of the assumptions connected with it. My research over the last eleven years has led me to widely different conclusions.

[15] *Raccolta di Scritti*, vol. iv, Rome, 1942, p. 85 ff.

[16] I cannot agree with all details of Nallino's examples, however. The structure of contracts in Islamic law, for instance, ought not to be equated with that of the old Roman consensual contract, and it is not based on Sura iv, 29, which uses a different terminology, but is much older. And *emphyteusis* did not penetrate into Islamic law only after several centuries, but is found from the earliest period onwards (cf. Becker, ibidem, p. 225 ff.). That a scholar of Nallino's standing could overlook this, shows how thoroughly foreign legal institutions were assimilated and Islamicized.

The evidence available to us now shows that Muhammadan legal science started in Iraq about A.H. 100. The development of doctrine in Medina was invariably secondary to and dependent upon that in Iraq. The early lawyers of Islam at the beginning of the second century of the Hegira took the popular and administrative practice of their time as their raw material and endorsed, modified, or rejected it, thereby creating Muhammadan law. "Traditions" purporting to relate legal decisions and relevant actions of the Prophet are considerably later, and as a rule do not originally express the doctrine of the ancient schools of law in Islam, but opinions proposed in opposition to them. The first specialists in religious law at the end of the first century A.H. concentrated their attention on questions of ritual and perhaps on kindred problems of directly religious interest, such as questions of conscience relating to alms tax, marriage and divorce. Legal problems, in the sense in which we use the word, began to be worked out not earlier than in the second century A.H. The legal opinions ascribed to authorities of the first century turn out, on closer investigation, to be spurious. This applies specifically to the information concerning Sa'id b. Musaiyib which led Bergsträsser to the dilemma that I mentioned before. The ancient sects of Islam, when they split from the "orthodox" community about the middle of the first century A.H., did not share with the majority the essentials of a law which did not yet exist, but they adopted the fully developed legal system of the "orthodox" community, making only superficial changes of their own, in the second half of the second century. These results which, much to my own surprise, the weight of the evidence forced upon me, put of course a new complexion on the whole problem of foreign elements in ancient Muhammadan law. What is important is not so much that the whole first century of the Hegira had been available for their adoption, if adoption of foreign elements there was, but that Muhammadan jurisprudence began only at a time when the door of Islamic civilization became widely open to the potential transmitters who were the educated non-Arab converts to Islam, and that its centre was not Medina but Iraq.[17]

I do not suggest that Iraq was ever a country of Roman law, but at the period in question it was deeply imbued with the spirit of Hellenistic civilization and at the same time contained great centres of Talmudic learning.[18] These are all the data we need in order to account for the existence of concepts and maxims of Roman jurisprudence in early Islamic legal science, and the regular occurrence of parallels in Talmudic law. If we survey those legal concepts and maxims whose common occurrence in Roman and Islamic jurisprudence seems to call for admitting an influence of the former on the latter, we find them mostly of that general kind which would be familiar not only to lawyers but to rhetors and generally to those who had received an Hellenistic education. Now Professor D. Daube has shown that Rabbinic methods of legal interpretation, which present reasonings familiar to earlier Roman legal classics, are deeply influenced not by those classics themselves but by Hellenistic rhetoric which was taught all over the Hellenistic world.[19] The same explanation is sufficient, and indeed necessary, in order to account for the presence in ancient Islamic legal science of Greek logic, as exemplified by conclusions *a maiore ad minus* and negatively *a minore ad maius*, the argument of the *sorites*, the concepts of genus and species, the *regressus ad infinitum*, and a whole technique of disputation. On the borderline between logic and legal science stands the principle of *istishab*, that is the presumption

[17] We know little about the Syrian school of law in early Islam, but we do know that the Syrians were influenced by Iraqian reasoning.

[18] See, e.g., A. Christensen, *L'Iran sous les Sassanides*, 2nd ed., Copenhagen, 1944, index s.v. *hellénisme;* M. Rostovtzeff, *The Social and Economic History of the Hellenistic World*, iii, Oxford, 1941, index s.v.*Mesopotamia*. M. Meyerhof, *Von Alexandrien nach Bagdad*, Berlin, 1930, p. 14 f (=*Sitzungsber. Preuss. Akad. Wiss. Phil.-hist. Kl.*, xxiii, 400 f.).

[19] In *Law Quarterly Review*, lii, 265 f.; in *Tulane Law Review*, xviii, 365 f.; and in *Hebrew Union College Annual*, xxii, Cincinnati, 1949.

that a legal status, once established, continues until the contrary is proved.[20] To legal science belongs the principle of *istislah,* or *utilitatis ratio.*[21] *Oiyas,* which is the technical term for analogy, systematic reasoning, must for linguistic reasons have been borrowed from Rabbinic *heqqesh,* itself presumably a translation of the Greek term συμβάλλειν.[22]

The central idea of the ancient schools of law in Islam, the idea of consensus itself, seems to have been taken over from Roman law via the schools of rhetoric. I am not speaking of the general consensus of the community at large on the essential duties of the Muslim, a definition to which Shafi'i towards the end of the second century of the Hegira tried to reduce the concept. This idea and its workings before and after Shafi'i are so natural that the question of foreign influence does not arise. The ancient schools of law, however, had a highly organized concept of the "consensus of the scholars" which consisted in the considered opinion of their majority and expressed the "living tradition" of the school. This concept corresponds to the *opinio prudentium* of Roman law, the authority of which was stated by the Emperor Severus in the following terms: "In ambiguitatibus quae ex legibus proficiscuntur, consuetudinem aut rerum perpetuo similiter iudicatarum auctoritatem vim legis obtinere debere."[23] This is again a general maxim which would be familiar not only to lawyers but to all who had studied rhetoric, and it is this fact which makes an influence, first suggested by Goldziher, feasible and, in view of other similar instances, likely.[24]

There is a maxim in Islamic law that "the child belongs to the [marriage] bed." This maxim, which was intended to decide disputes about paternity, has been regarded, on insufficient evidence, as an authentic rule of pre-Islamic Arab practice, but Goldziher has shown that it had not yet prevailed in the middle Umaiyad period, say about A.H. 75. In the middle of the second century, it had been put into the mouth of the Prophet, but it is, strictly speaking, incompatible with the Koranic rulings regarding paternity, and in Islamic law as it exists the maxim, though often quoted, is never taken at its face value.[25] In order to decide cases of disputed paternity, Muhammadan law falls back not on the maxim but on the old Arab procedure of calling in professional physiognomists. It is likely that the maxim, which agrees neither with old Arab custom nor with the Koran, but has its parallel in the Roman legal maxim "pater est quem nuptiae demonstrant," penetrated from outside into Islamic discussions, though it did not succeed in modifying positive law. Again it is a norm which would be familiar to all persons trained in Greco-Roman rhetoric.[26]

There was no punishment for theft in pre-Islamic Arabia, and the mutilation of the culprit by cutting off his hand was introduced by the Koran.[27] The idea of pecuniary penalties is, and has been from the beginning, foreign to Muhammadan law. The earliest doctrine, which was maintained by the Iraqians, even made the Koranic punishment for theft incompatible with the responsibility of the thief for damages; according to the mitigated and therefore inconsistent doctrine of the Medinese, the claim for monetary compensation lapsed if the thief

[20] For Roman and Talmudic parallels, see D. Santillana, *Istituzioni di diritto musulmano malichita,* 2nd ed., i, 327; Goldziher, in *Vienna Oriental Journal,* i, 231 ff.

[21] For parallels, see Santillana, *ibid.,* 71; Goldziher, *ibid.,* 229. The oldest document, in which this consideration is expressed, is an Iraqian "tradition," on which see my *Origins,* p. 111.

[22] See Margoliouth, in *J.R.A.S.,* 1910, p. 320; and my *Origins,* p. 99 f.

[23] Both on the Roman and on the Islamic side, custom and practice are reduced to the considered opinion of the lawyers.

[24] Cf. *Origins,* p. 83.

[25] Zurqani's commentary on Malik's *Muwatta',* xxxvi, 20, explains the systematic difficulties inherent in the "tradition" from the Prophet.

[26] Cf. *Origins,* p. 181 f.

[27] Mutilation as a punishment of coin-clippers and counterfeiters is advocated by spurious "traditions" quoted in Baladhuri, *ibid.,* 470. R. S. Lopez, in *Byzantion,* xvi, 445 ff., has suggested a Byzantine origin. If this is correct, it would be a case of proposed adoption of a judicial practice which existed in the conquered territories.

was subject to the Koranic punishment and insolvent; if the stolen object still existed in the possession of the thief, it was of course returned to its owner.[28] In any case, any damage culpably inflicted gives rise to a claim for simple compensation only. If we therefore find some legal "traditions" unsuccessfully advocating as part of the punishment of a thief to whom the Koranic penalty cannot be applied, that he should be responsible for double the value of the object stolen,[29] we must look outside for the source of this idea which can have its origin neither in pre-Islamic Arab customary law nor in the Koran, and which contradicts a consistently applied principle of Muhammadan law.[30] The Roman law of *furtum* offers itself instantly as the most likely source.

By an extension of the idea of theft which, too, went against an acknowledged principle of Islamic law, the effort was made in a related type of legal "tradition" to make a person who was guilty of stealing by finding and concealing a stray camel, responsible for twice its value, or for returning it and another camel of equal value.[31] This was not to apply to all cases of stealing by finding, but only to the special case concerning stray camels, and it was destined to remain as little successful as the suggested pecuniary penalty for theft from which it was derived.

Under the traditional approach to the early history of Islamic law and jurisprudence it would have been difficult, if not impossible, to admit the influence of a Roman legal idea on legal "traditions" which were uncritically regarded as more or less genuine reflexions if not of the actual rulings of Muhammad, at least of the customary law of Medina. Now we know that this kind of legal "tradition" purporting to go back to the Prophet was put into circulation when the second century of the Hegira was well under way, in order to change the established doctrine of the ancient schools of law.[32]

In this instance of the penalty for theft it is out of the question either that parts of the practical administration of penal law in conquered Byzantine territory should have been continued by the Muslims amongst themselves, or that early Muhammadan lawyers should have adopted consciously any principle of Roman law—if only for the simple reason that the Islamic (unsuccessful) legal doctrines differ in many important respects from the teachings of Roman law on *furtum* —but we must conclude that the general idea of holding the thief responsible, under certain conditions, for double the amount he had stolen became familiar to some Muslims through Christian converts and was taken over by them. This idea is one that every educated person among the original inhabitants of Iraq and Syria would know. By the process which I am trying to elucidate, the Muslims appropriated, as it were, worn-off coins of ideas, transmitted to them after a long usage and after many of their distinctive features had been effaced. In this respect, the adoption of Roman legal ideas and maxims by the Muslims through the intermediary of the schools of rhetoric and through persons with an Hellenistic education resembles the contemporaneous introduction of Greek philosophical ideas and problems into Islamic theology.

In pre-Islamic Arab usage, the term *rahn*, "security," meant a kind of earnest money which was given as a guarantee and material proof of a contract, particu-

[28] The two doctrines mentioned survived in the Hanafi and the Malaki school respectively (cf. Schacht, *G. Bergsträsser's Grundzüge*, p. 101; Santillana, ibid., ii, 455). Only Shafi'i, at the end of the second century, and his school accepted the unrestricted responsibility of the thief for simple damages.

[29] See Ibn Hanbal, ii, 180, 207; Abu Dawud, x, xxxvii, 13; Nasa'i, xlvi, 12; Baihaqi, viii, 278; *Kanz al'Ummal* iii,, 1513, 1529, 1544. A derived form occurs in Malik's *Muwatta'*, xxxvi, 38 (ed. Cairo, 1310, iii, 211), and in Baihaqi, loc. cit.

[30] The followers of "traditions," and therefore the Hanbali school, naturally adopt this doctrine in respect to the cases directly mentioned in them, though it breaks the system (cf. Ibn Quadama, *Mughni*, x, 262 ff.). The irregularity of the derived form of the "tradition" (see the preceding note) from the point of view of Muhammadan law is pointed out by Shafi'i, *Treatise III*, 69 (*Umm*, vii, 215).

[31] See Abu Dawud, x; Baihaqi, vi, 191; *Kanz al-'Ummal*, vii, 3808, 3841. A fine of one-third of the value is imposed in a parallel version in *Kanz al-'Ummal*, vii, 3826, 3827.

[32] Cf. *Origins*, pp. 66, 178.

larly when there was no scribe available to put it into writing. The word occurs in this meaning in the Koran.[33] Used of persons, it meant a kind of hostages who were produced by each party to a lawsuit as a guarantee that the parties would submit to the decision of the arbitrator.[34] But the ancient schools of law recognized neither the institution of earnest money nor that of hostages, and knew *rahn* only in the new meaning of a security for the payment of a debt. The foreign origin of this doctrine which neglects old Arab usage and an explicit passage in the Koran is probable, and Roman law presents us with an obvious model in the institution of *pignus*.[34a] The Muslims found this institution in the conquered Byzantine provinces, and their early lawyers approved of a corresponding elementary definition of *rahn*. When they came to work out the details of their doctrine, it evolved through essentially the same sequence of stages as it had done, many centuries earlier, in Roman law.

The oldest known opinion states that "the security takes the place of that for which it is given," for instance, if the security perishes whilst it is in the possession of the creditor. This opinion was held in Iraq; it was also known in Medina and in Mecca. Somewhat later, however, the Iraqian school mitigated this extreme doctrine. The old Iraqian maxim was countered in Medina by the opposite maxim "the security is not forfeited," for instance, if the debtor fails to pay the debt within the stipulated time. This is a late, polemical counter-statement and does not adequately express the Medinese doctrine which is considerably influenced by the mitigated doctrine of the Iraqian school. The doctrines of the Iraqian and of the Medinese school survive in the Hanafi and in the Maliki school respectively, and represent two successive stages in abandoning the oldest opinion. Shafi'i completed this process and was the first consistently to apply to securities the concept of a deposit on trust.[35] A technical influence of Roman on nascent Muhammadan jurisprudence is out of the question in any of these stages.

To mention at least one similar case of contact between the canon law of the Eastern churches and ancient Muhammadan law: the law of Islam, it is well known, is very severe against adultery and fornication, but it has never erected them into impediments to marriage.[36] Muhammadan law knows prohibited degrees, but they are all based either on consanguinity or on affinity or on fosterage. All other impediments to marriage can be remedied by appropriate action, for instance, a man who is married to four wives can marry again if he repudiates one of them, or the Muslim who wants to marry a polytheist woman can do so if she adopts Islam; the only permanent impediment to marriage, outside the prohibited degrees, is created between a former husband and wife who have undergone the formal procedure of mutual imprecation known as *li'an*.[37] Now it is very surprising to find in Maliki law (and, with differences of detail, in the law of the so-called "Twelver" Shiites) a permanent impediment to marriage between a man and a woman who have gone through a form of marriage during the waiting period (*'idda*) following the termination of a previous marriage of the woman to another husband,[38] and have had intercourse. This impediment arises even from a bona fide marriage, it arises even if the intercourse itself has taken place after the end of the waiting period in question, but it does not arise if they have gone through a form of marriage during the existence of a previous marriage of the woman, or have had intercourse during it. The systematic basis for this

[33] Sura ii, 283.

[34] Cf. E. Tyan, *Histoire de l'Organisation Judiciaire en Pays d'Islam*, i, Paris, 1938, p. 73 f.

[34a] The Sassanian *graβth*, on the other hand, denotes the *antichresis* rather than the *pignus* proper; cf. A. Pagliaro, *L'anticresi nel diritto sasanidico*, in *Rivista degli Studi Orientali*, xv, 275 ff.

[35] Cf. *Origins*, p. 186 f.

[36] Except for one particular doctrine, on which see below.

[37] See *Encyclopædia of Islam*, iii, s.v.

[38] During the *'idda*, the woman is barred from remarrying.

doctrine in the Maliki school is a Medinese "tradition" concerning a decision of the Caliph 'Umar, interpreted literally and restrictively; the doctrine is the minimum consistent with its wording. That this was not the original purport of the tradition is evident. What its import was becomes clear from a group of earlier Iraqian "traditions" of a kind which regularly corresponds to that type of Medinese tradition, save that they were not successful in influencing the doctrine of the Iraqian school. Now these ancient Iraqian "traditions" aim at erecting adultery or fornication into a permanent impediment to marriage.[39] This doctrine, which prevailed only in the law of the Ibadi sect and is otherwise unprecedented in Muhammadan law, is a well-known feature of canon law. Again it was not canon law itself that influenced Muhammadan jurisprudence, but the Christian converts to Islam brought their ideas of adultery as an impediment to marriage with them into their new religion, and this concept found expression in the "traditions" in question.[40]

I will take my last example from Persian Sassanian law, of which I said before that we know very little. But we do know that Ibn Muqaffa', a Persian secretary of state who served under the last Umaiyads and the first 'Abbasids and died about A.H. 140, in a memorandum or treatise which he wrote in the last few years of his life,[41] suggested that the Caliph should review the doctrines of the ancient schools of law, and codify and enact his own decisions. These considerations lie quite outside the compass of the ancient lawyers of Islam, and are obviously influenced by Sassanian administrative tradition.[42] This Persian idea and its rejection by the specialists in Muhammadan law was transferred into an Islamic setting and expressed in an anecdote according to which one of the early 'Abbasid Caliphs, either Mansur, or Mahdi, or Harun al-Rashid, intended to endow Malik's *Muwatta'* with the character of an official code, and desisted only on the entreaties of Malik himself.[43] This shows how thoroughly foreign elements were incorporated into an Islamic background.

I trust I have shown that legal concepts and principles, including even fundamental ideas of legal science, entered Muhammadan law from outside, in particular from Roman law, and have further shown how their adoption took place. Whether these influences amount to little or much is irrelevant; the important fact is that they did happen. The examples which I have given are restricted to cases I had occasion to investigate myself when working out, without any reference to the question of possible influences from outside, the new approach to the early history of Muhammadan law and jurisprudence of which I spoke before. This new approach not only frees us from the apparent impossibility of accounting for parallels which cannot be coincidences,[44] it enables us to establish the early history of Islamic law and jurisprudence, a task that must precede any reference to outside parallels. My aim in presenting these remarks is not to give any final solutions, it is merely to re-establish the subject, in Goldziher's words, as "one of the most attractive problems of this branch of Islamic studies."

THE CASE OF BANK NATIONALIZATION

A Study in Australian Government.

[*Contributed by* PROFESSOR GEOFFREY SAWER.]

ON December 10th, 1949, the Australian Federal Labour Party government, headed by Mr. J. B. Chifley, was defeated at the polls by the anti-socialist Liberal

[39] The Medinese "tradition," in other words, treats a marriage during the *'idda* as if it were adultery.

[40] I intend to treat of this problem in detail in a separate paper.

[41] *Risala fil-Sahaba.*

[42] Cf. *Origins*, p. 95.

[43] *See Encyclopædia of Islam*, iii, s.v. *Malik b. Anas.* For other anecdotes of similar tendency, see *Origins*, p. 96 and n.l.

[44] I have taken particular care to show the irregular or unprecedented character of doctrines which must be derived from other than purely Arab and Islamic sources.

Party-Country Party coalition. Thus the electors ended, or at least adjourned indefinitely, one of the most celebrated politico-legal disputes in Australian history, namely the Case of Bank Nationalization. The history of this case provides some particularly instructive examples of complex interaction between political forces, judicial doctrines and the influence of strong personalities. During its course, every major express proposition and unstated assumption of Australian constitutional structure and political organization fell to be debated.

The story begins with the history of a judicial doctrine. The Australian Federal Constitution, drafted by constitutional conventions in Australia between 1891 and 1898, and enacted into law by the British Parliament as the Commonwealth of Australia Constitution Act 1900,[1] is a blend of federalism derived from the U.S.A. and responsible government derived from Great Britain. It is a more complex and sophisticated document than the Constitution of the U.S.A., since the Australian Founders were able to learn from American experience and to make express provision for matters which in the U.S.A. had had to be dealt with by judicial "interpretation." From British principles of responsible government the Founders took such un-American principles as a parliamentary cabinet executive, parliamentary supremacy rather than peoples' sovereignty,[2] concentration rather than separation of powers,[3] and a general reliance on convention and on political sanctions for the protection of individual liberties rather than on express constitutional guarantees.[4] Nevertheless, by leaving to the States a large degree of autonomy, and by making them the residuary legatees of powers not specifically granted to the new Federal government, the Founders deliberately followed the general distribution of powers of the U.S. federal system. The first three Justices of the new federal High Court of Australia[5]—Sir Samuel Griffith C.J., Sir Edmund Barton J. and O'Connor J.—had taken a leading part in the drafting of the Constitution which it was now their duty to guard and interpret, and from the first they expressed a strong opinion that in problems of relations between the Federal and State governments, they should apply the main doctrines which the Supreme Court of the U.S.A. had developed in relation to the cognate problems of the American system. In particular, they took from the constitutional jurisprudence of the U.S. Supreme Court the principle of "implied immunity of instrumentalities." In the U.S.A., the corresponding doctrine is known as "intergovernmental tax immunity," since it has there been applied as yet only to prevent the unit governments of the system from taxing each other's property and agencies;[6] the Australian Court generalized the principle to secure a general immunity of the essential governmental functions of the unit governments from interference, under whatever head of power, by the other governments —(though with exceptions dictated by the express terms of the Constitution, or by the peculiar nature of such powers as that of levying customs duties).[7]

[1] 63 and 64 Vic. c. 12.

[2] But as the formal sovereignty of the British parliament withers away, the nearest approach to a determinate juridical sovereign in Australia will be the combination of the Federal parliament and the people voting at a referendum required to amend the Constitution—(Con. sec. 128).

[3] Judicial power, however, is more rigidly isolated than in Britain; see e.g. N.S.W. v. Commonwealth (1915) 20 C.L.R. 54.

[4] There is a guarantee of religious toleration—(Con. s. 116)—and the guarantee of freedom of inter-state trade—(Con. s. 92)—will be dealt with later in this article.

[5] The Founders wished it to be the final Court of Appeal for Australia. The British government objected, and in the resulting compromise, a wide field was left for appeals to the Judicial Committee of the Privy Council, but the High Court became for practical purposes the final Court on matters concerning the mutual relations of Federal and State Governments; Con. s. 74.

[6] The foundation American cases were McCulloch v. Maryland 4 Wheat. 316 and Collector v. Day 11 Wall. 113. The history of the U.S. doctrine has been brilliantly traced by Thomas Reed Powell in 58 *Harvard Law Review,* 633-674 and 757-805.

[7] The foundation Australian case was D'Emden v. Pedder (1904) 1 C.L.R. 91. See also the Railway Servants' Case (1906) 4 C.L.R. 488 and the Steel Rails Case (1908) 5 C.L.R. 818.

The immunities doctrine was, however, repudiated by a group of Justices appointed to the bench from 1907 on, two of whom—(Isaacs and Higgins JJ)—had also been leading members of the constitutional conventions and spoke with authority almost equal to that of the senior Justices; these dissentients obtained some assistance from a decision of the Judicial Committee of the Privy Council which had disapproved the immunities doctrine, but which the High Court had refused to follow.[8] By 1920, the dissentients had converted a majority of the Court to their view, and in the most celebrated Australian decision of the half century, known as the Engineers' Case,[9] they overruled the doctrine of implied immunity of instrumentalities and the decisions depending on it. They held that the Commonwealth and the States may, by legislation intended so to do, regulate the activities of each other's agencies, provided that the relevant legislation is otherwise within power and not prohibited by any express provision of the Constitution, and subject in the case of State law to the overriding effect of inconsistent Federal legislation. But in the years between 1920 and 1947, members of the Court in scattered *obiter dicta* suggested that the repudiation of the immunities doctrine in the Engineers' Case was not final, and that the Court was still free to infer from the "essential" nature of federalism some further restriction on mutual interference between the unit governments than the Constitution expressly laid down.[10]

Here we may leave the judicial actors for a time and introduce the political characters. In 1941, a Labour Party administration secured control of the Federal government, and continued in power with solid majorities at successive general elections up to and including the election of 1946. It had the good fortune to produce at the right time two leaders of outstanding personal qualities, the late John Curtin and Mr. J. B. Chifley; the latter was Treasurer under Curtin, succeeded him in the Prime Ministership, and today leads the Labour Party in Opposition. These administrations controlled the war economy of the continent, from the darkest period of Japanese success until final Allied victory, with very great distinction. In 1921 the Labour Party had adopted as its major ultimate objective "the socialization of industry, production, distribution and exchange," but its general policy had continued to be much more empirical and moderate than this objective would suggest. The Constitution itself enforces a cautious and fabian policy; the Commonwealth Parliament lacks the legislative power to enact wholesale socialist programmes, while the States, which have more legislative power, lack the necessary financial and political strength, and four of them have upper Houses of Parliament elected on a restricted franchise which ensures anti-Labour majorities. The war-time policies of the Labour Government had shown characteristic features which would doubtless have been absent from the policy of an anti-Labour administration, and business men accumulated during that period a number of grievances over the administration of price and profit control, import restrictions, methods of settling industrial disputes and so forth; nevertheless, the Government devoted its attention primarily to winning the war and hardly at all to advancing the cause of socialism. But the measures which all Governments have to take in war-time savour strongly of collectivism, and such measures take on quite a different aspect if continued long in peace-time. From 1945, the Chifley government began a process of continuing some war-time measures as peace-time policy, and of adding further measures of a collectivist nature such

[8] Webb v. Outrim [1907] A.C. 81.

[9] Amalgamated Soc. of Engineers v. Adelaide Steamship Co. Ltd. 28 C.L.R. 129. The case began a long period of decisions favourable to the expansion of Commonwealth power; political and financial circumstances led to the same end.

[10] See especially *dicta* of Dixon and Evatt JJ. in West v. Commissioner of Taxation (1937) 56 C.L.R. at 681-2, 687-8.

as a national health scheme,[11] a Government-owned inter-state airline with a monopoly of the service,[12] and a Government-owned shipping line.

Probably the most important single element in this conversion from war-time to peace-time collectivism was Labour's policy for strong central regulation of the nation's banking system, to be exercised by the Commonwealth Bank of Australia under the direction of the Federal Government. The Commonwealth Bank is both a central bank and a trading bank; it is the banking agent of the Federal Government, and is wholly owned by that Government. In 1945, the Commonwealth Parliament gave effect to Labour banking policy in two Acts, the Banking Act and the Commonwealth Bank Act; these Acts subjected the Commonwealth Bank to the general policy direction of the Federal Treasurer—(a position which Mr. Chifley combined with the Prime Ministership)—and subjected the private trading banks to the financial and policy control of the Commonwealth Bank. The control of the private banks was directed to the general advances, interest and discount policy and required them to deposit their surplus funds with the Commonwealth Bank at low interest rates; it was a more stringent central bank system than the British and American, but in substance was nothing more than an application of theories of banking control developed by Keynes and his school. This reliance on credit controls is characteristic of a considerable section of the Australian Labour Party. Professor Louise Overacker has brilliantly described the struggles between right, centre and left in that Party over policy and tactics,[13] and I would only add to her account that Mr. Chifley himself has long made banking and credit policy his particular hobby and has shown in public and private life a great deal of financial acumen. He and the "middle group" in the Labour Party have great faith in the possibility of central bank control making capitalism bearable by ironing out its periodical crises, and tend to regard direct socialization not as an immediate general objective but as a technique to deal with public utilities, monopolies and developmental projects. Hence the banking legislation of 1945 was in a high degree the personal achievement of Mr. Chifley and every section of it had become very dear to his heart.

One of the cardinal principles of this central banking policy was that the accounts of Governments and their agencies should be kept at the Commonwealth Bank itself, a rule for which there is respectable support among economists and which appeared in sec. 48 of the Banking Act, 1945, as follows: "Except with the consent in writing of the Treasurer, a (private) bank shall not conduct any banking business for a State or for any authority of a State, including a local governing authority." In fact several States and hundreds of State authorities had for years kept their accounts at the central bank, and the above section was not enforced until May, 1947, when Mr. Chifley as Treasurer announced that it would from then on be brought into effect. Thereupon the Melbourne City Corporation, which kept its accounts with a private bank and wished to continue doing so, brought suit against the Commonwealth for a declaration that sec. 48 of the Banking Act, 1945, was beyond the power of the Commonwealth, on the ground, *inter alia*, that it "discriminated against" the States and their agencies, or imposed "special burdens" on them, by depriving them of a facility—the private banks—which remained available to the public. It has been alleged and denied that some of the private banks assisted the Melbourne City Corporation in this action. Certainly the writ as originally framed sought a declaration of

[11] Held invalid by the High Court in the Pharmaceutical Benefits Case (1945) 71 C.L.R. 237. A constitutional amendment to overcome this decision was approved at a referendum in 1946, but key sections of a second scheme were held invalid in B.M.A. v. Commonwealth (1949) A.L.R. 865.

[12] In A.N.A. v. Commonwealth (1946) 71 C.L.R. 29, the High Court held that the service was validly instituted under the Commonwealth's inter-state commerce power—(Con. sec. 51 (i)—but that the monopoly provision was invalid as contravening the guarantee of freedom of inter-state trade in Con. sec. 92.

[13] In Vol. XLIII, *American Political Science Review*, 677 (August, 1949), and in a forthcoming book.

invalidity as to other sections of the Banking Act which did not immediately concern Melbourne City, but the case came to trial in the High Court solely on the issue of sec. 48; the States of South Australia and Western Australia intervened to support Melbourne City, and it is convenient to call this the State Banking Case.[14] Shortly before this, Dixon J., in a case decided by the majority of the High Court on other grounds, had delivered a judgment in which he examined at great length the history of the immunities doctrine in Australia and the U.S.A.[15] His Honour had recently returned from a period of service as His Majesty's Australian Minister to Washington, where he had been able to refresh at first hand an already formidable knowledge of U.S. case law. In the result, he expressed a very decided opinion that there was a bed-rock doctrine of implied immunity of instrumentalities which any federation must have, and which was to be found somewhere in the rather conflicting opinions of the U.S. Supreme Court in New York v. U.S. (The Saratoga Springs Case).[16] It is probable that this opinion, uttered by a Justice with great prestige in such matters, encouraged the plaintiff in the State Banking Case to bring its suit, in which Dixon J. had the satisfaction of seeing his views adopted in substance by three other Justices—(Rich, Starke and Williams JJ.). These four Justices, constituting a majority of the Court, accordingly held the section invalid on the ground that such "discrimination" against a State or its agency was impliedly prohibited by the Constitution, notwithstanding that the section was *prima facie* a law with respect to banking under sec. 51 (xiii) of the Constitution and not contrary to any specific prohibition of the Constitution.[17] The limits of this restricted version of the doctrine of implied mutual immunities are as yet uncertain; it may apply only to "discriminatory" legislation, or it may invalidate even non-discriminatory legislation which *unduly* interferes with any *essential* governmental function of other governments in the system. It seems likely that the new doctrine will be given a cautious and limited application, but the ambiguities in the opinions of the High Court and the Supreme Court of the U.S.A. on this matter are sufficient to create a wide area of judicial discretion.

Mr. Chifley reacted immediately and dramatically to this attack on his cherished legislation. He announced that he would recommend to his party Caucus that the private banks of Australia should be abolished and their business transferred to the Commonwealth Bank. He had advocated the nationalization of the whole banking system in a minority report as a member of a Royal Commission on Banking in 1937, and this policy had since been suggested by left-wing members of his party, but it is not impossible that the proposal was brought directly to his mind at this particular moment by a passage in the judgment of Dixon J. in the State Banking Case itself. Counsel for the Commonwealth had argued that it would be competent to the Commonwealth to abolish the private banks altogether, and that therefore the lesser step of denying their services to the States must be within power. In reply to this argument, Dixon J. said: "That is only to say that instead of establishing a monopoly with all its advantages and disadvantages shared by the whole community, States have been singled out and deprived of the freedom of choice which the existing system afforded. . . . If there be a monopoly in banking lawfully established by the Commonwealth,

[14] Melbourne Corporation v. Commonwealth (1947) 74 C.L.R. 32.

[15] Essendon Corporation v. Criterion Theatres Ltd. (1947) 74 C.L.R. at pp. 16-27.

[16] (1946) 326 U.S. 572. The opinions dealing with implied immunities fall into three groups and all are *obiter*.

[17] Latham C.J. held the section invalid on a different ground, and McTiernan J. dissented. For a radical criticism of the majority doctrine, see *Res Judicatæ*—(Melbourne, Law Book Co. of Australasia)—Vol. IV, pp. 15, 85. It is arguable that even if such an implied prohibition is necessary in a federation, the only relevant discrimination in this context would have been as between what the States were required to do and what the Commonwealth itself was required to do, not as between legal persons so entirely dissimilar in all relevant respects as States and private individuals.

the State must put up with it."[18] Mr. Chifley's decision was not received with unqualified enthusiasm even in his own party, but his personal prestige and his authority on all questions of financial policy were so great that his decision was endorsed by Labour Caucus, and by the extra-parliamentary political and trade union organizations supporting Labour. Outside the Labour Party, the decision was bitterly attacked not only by the professionally anti-Socialist parties, but also by large numbers of middle-of-the-road groups and individuals, and it soon became apparent from public opinion polls and from State elections that bank nationalization was strongly opposed by a majority of the electors. The most striking indication came from the State of Victoria. A Labour government was in power there whose personnel and administrative record had given a good deal of satisfaction. However, it lacked a majority in the Upper House of the State Parliament; the franchise for the House was such as to guarantee an anti-Labour majority, and that majority, which included a prominent private bank director, used its legal power in defiance of convention in order to refuse supply to the Government and so force on a State general election. In previous deadlocks between the Houses in Victoria, the Lower House electorate—(based on universal suffrage)—had always supported the Government against the Upper House, and the Labour Party fought the election on the issue of the undemocratic character of the Upper House and its abuse of its powers. The anti-Labour parties fought the election on the platform of producing an electoral demonstration against bank nationalization. It was in vain for the State Labour leaders to protest, as was the fact, that bank nationalization was a wholly Federal issue, on which the State parliament could do little either to help or hinder. The electors treated the election as the anti-Labour parties desired, and Labour was routed; the fact that in doing this the electors endorsed the extraordinary action of the unpopular Upper House in refusing supply on a Federal issue only made the lesson for the Labour Party more emphatic. But the Party was now committed to bank nationalization, and legislation to bring it about was duly enacted by the Federal Parliament in the Banking Act, 1947.

In the bitter debates about this measure which went on in Parliament and in heavily attended public meetings all over the country, much of the argument turned on the familiar case for and against socialism. There were, however, some additional arguments peculiar to this case. On the economics of the situation, Labour urged that the private banks already closely approached a monopoly. Australia has an elaborate branch banking system. There is none of the insistence on local unit banking characteristic of the U.S.A. The great bulk of the nation's banking business was carried on by nine huge organizations which, partly because of co-operative arrangements and partly because of the tight policy control of the Commonwealth Bank, pursued closely similar policies. The Banking Act, 1947, had to provide for the transfer to the Commonwealth Bank of only fourteen corporations in all, of which eight were incorporated in Australia, three in Britain, and three in other countries. To this the supporters of the private banks replied that while their general advances and interest policies are uniform, there is keen and active competition between them for the business of particular individuals, so that a man denied an overdraft by one bank stands a reasonable chance of obtaining one elsewhere. The anti-Labour parties claimed that government monopoly in banking would give bureaucrats a dangerous degree of knowledge of the financial affairs of individuals, and great opportunities for the exercise of petty tyranny at the best and gross corruption at the worst. To this the Labour Party replied that there had never been any complaint about such tendencies in the civil service generally, and that the Income-tax officials in particular obtained great knowledge of individual financial affairs without any suggestion of abuse of power. The anti-Labour parties claimed that since the Labour Party had been elected on policy speeches which made no reference to bank nationalization, it was contrary to the political ethics of the "mandate" for this measure to be

[18] 74 C.L.R. at p. 84.

enacted without either a plebiscite or a fresh election. The Labour Party replied that firstly, its general policy of socialism covered all particular cases of socialization; that secondly, its banking policy had been specifically approved by the electors, and a key part of that policy was to ensure that all Government accounts were held by the Central Bank, an objective which a High Court Justice now said could be achieved (if at all) only by nationalizing the whole banking system. The Labour Party said further that in any event, the State Banking Case had only been the opening shot of a campaign by the private banks against the whole of the 1945 legislation, as evidenced by statements of bank directors and by the claims as to other sections of the 1945 Acts which had been dropped in the State Banking Case. To this it was replied that apart from the discriminatory section 48 of the 1945 Banking Act, the High Court had adopted in the State Banking Case a very wide interpretation of the meaning of "law with respect to banking," and had given no encouragement whatever to the private banks in any theory they might have held as to the invalidity of other sections of the Act; that it would be time enough to resist other attacks on the banking legislation when, if ever, they occurred; and that nationalization of the whole system was a grossly disproportionate measure for achieving the objectives of the relatively minor part of the legislation invalidated in the State Banking Case. These are a few of the major issues raised, issues which are relevant to the aims of socialist and anti-socialist parties and to the ethics of democratic government everywhere.

A point to which little attention was paid at the time is as follows. The Commonwealth's power to deal with banking is express, and the relevant section is: "Banking, other than State banking; also State banking extending beyond the limits of the State concerned, the incorporation of banks, and the issue of paper money."[19] The High Court held in the State Banking Case that "State banking" means the carrying on of banks by State governments, not the activities of States as *customers* of banks. The result is that so long as a State-owned bank confines itself within the limits of the State concerned it is immune from any Commonwealth regulation of its business or policy. As soon as the bank nationalization policy was announced, all the States began to investigate the possibility of establishing trading banks of their own, or of extending their business where they already existed, and four States made very active preparations to absorb staff and if possible to obtain buildings from the private banks. There would have been a number of practical difficulties in their way, but it is probable that in the course of time several large and active State trading banks would have come into being, operating in competition with the expanded Commonwealth Bank and if they pleased defying the credit policy of the Commonwealth Bank. Even a Labour Party State government would have been tempted to make earning profits the main purpose of a State trading bank, since the Commonwealth has established a monopoly of income taxation[20] and the States, entirely dependent on Commonwealth grants for their solvency, are glad of any additional source of revenue. State anti-Labour governments would have felt it almost their duty to follow a different banking policy from that of the Commonwealth Bank, at least while the Labour Party controlled the latter's policy. Hence it is arguable that as the Constitution stands, a mixture of government and private banks is more easily controlled on Keynesian principles than would be a system consisting exclusively of government banks.

The Banking Act of 1947 was a complex measure which can be summarized under three heads. Firstly, it contained definition and construction sections which, *inter alia,* urged the Courts to sever valid from invalid sections to the utmost limit consistently with judicial function.[21] Secondly, it provided for the

[19] Con. sec. 51 (xiii).

[20] Held valid in the Uniform Tax Case (1942), 65 C.L.R. 373.

[21] Note especially sec. 6 (c); severance is to take place notwithstanding that this "may result in this Act having an effect different, or apparently different, in substance from the effect of the provisions contained in this Act in the form in which this Act was enacted by Parliament."

transfer to the Commonwealth Bank of the assets, liabilities and business of the private banks, with provision for the payment of compensation. Thirdly, sec. 46 of the Act prohibited the private banks from carrying on the business of banking after a date to be fixed by the Government. Suits were commenced to restrain the operation of this legislation, and to obtain a declaration of its invalidity, even before it had been proclaimed; they were brought by the private banks, and also by the States of Victoria, South Australia and Western Australia and we shall call the consolidated actions the Bank Nationalization Case. After a very long hearing in the High Court, nearly every section of the Act was held invalid on a large variety of grounds.[22] There was great difference of opinion among the six Justices, concerning details, but the general effect was as follows.[23] The acquisition sections were held invalid on grounds, such as defects in the method of compensation provided, which could readily be overcome by amendment of the Act. The prohibition section 46 was held invalid by a majority solely on the ground that it infringed the guarantee of freedom of inter-state trade and commerce in sec. 92 of the Constitution; this was not a matter curable by amendment. The Court considered that if sec. 46 were valid, it could under the construction clauses be severed from the rest of the Act and allowed to operate in isolation. One would have expected the Government to amend the legislation to the extent that amendment could overcome the High Court's judgment, and then to take a complete measure before the High Court and if necessary on appeal to the Judicial Committee. But for tactical reasons which have not been explained, the Government decided instead to appeal at once, so far as the Constitution allowed, to the Judicial Committee of the Privy Council.

The Australian Constitutional Fathers wished to abolish appeals to the Privy Council in all matters of purely Australian concern. Owing to the strong opposition of Joseph Chamberlain and the Colonial Office, a compromise was reached which is embodied in sec. 74 of the Constitution. This enables the Commonwealth Parliament to abolish appeals if it pleases—a power it has not exercised. Until then, appeals may be taken from the High Court by special leave of the Judicial Committee, except in *inter se* matters; on such matters, appeal may be taken only by special leave of the High Court itself. The High Court has established a practice of granting leave only in very exceptional cases.[24] It is probable that neither the Colonial Office nor the Australian statesmen who drafted sec. 74 had any very clear idea as to what was a "question . . . as to the limits, *inter se,* of the Constitutional powers of the Commonwealth and those of any State," but memoranda in Colonial Office files at the Public Record Office in London rather suggest that questions of *exclusive* power were intended. These are few in number, and such a view would justify the Colonial Office belief at the time that it had the best of the bargain. The Judicial Committee and the High Court, however, have constructed an elaborate theory of what constitutes an *inter se* question,[25] the result of which is that all issues as to whether the Commonwealth possesses a particular power or not—whether an exclusive or a concurrent power—are *inter se,* so that the number of cases requiring High Court certificate for appeal is much greater than the Colonial Office expected, and the confidence of the Australian negotiators, headed by Alfred Deakin, that *they* had the best of the bargain has been justified by events. Nearly all the arguments in the High Court over the *acquisition* sections of the Banking Act clearly raised *inter se* questions. However, the Courts have held that an *inter se* question is *not* raised by a constitutional *prohibition,* such as sec. 92, which

[22] Sub. nom. Bank of New South Wales and ors. v. Commonwealth and ors. (1948) 76 C.L.R. 1.

[23] For a more comprehensive summary, see 22 *Australian Law Journal,* p. 213.

[24] It has granted leave only once in 50 years; in the Royal Commissions Case 15 C.L.R. 182, where the Court had been equally divided on the main issue.

[25] Jones v. Commonwealth Court, etc. (1917), A.C. 528; Ex parte Nelson (1929) 42 C.L.R. 258, per Dixon J. at 269 ff.

operates not to define any *mutual* limits of power, but merely to cut down the powers of *both* Commonwealth and States.[26] Since sec. 92 was the only ground on which the High Court had invalidated the *prohibition* section of the Banking Act, the Commonwealth sought leave to appeal from the Judicial Committee solely in respect of that section. It did not attempt to obtain a certificate from the High Court in respect of the other sections, and such an attempt would probably, on the authorities, have failed. The Judicial Committee granted leave to appeal. After a long hearing, the Board decided[26a] that leave should not have been granted, on the ground that although the appellant Commonwealth was not raising any *inter se* questions before the Board, but was concerned only to rebut the High Court's interpretation of sec. 92 of the Constitution which does not raise *inter se* questions, still the respondent banks and States had challenged the validity of sec. 46 of the Banking Act in the High Court and before the Board on many other grounds, several of which undoubtedly raised *inter se* questions; in the Board's view, it could not deal in isolation with the section 92 argument, but must be able to deal with the whole issue of the validity of sec. 46, and was prevented from doing so because some of the issues to be decided were *inter se* and there was no certificate from the High Court. This construction of the effect of sec. 74 of the Constitution disregards a good deal of contemporary evidence that the Founders—(including in this case the Colonial Office)—did intend that the *inter se* issues or arguments in a particular cause should be separated from the non-*inter se* issues or arguments, and that the latter should be capable of decision in the Judicial Committee separately from the former, even although the result would not be a final judgment for one side or the other in the whole cause. However, decision on bare legal questions is contrary to the genius of English judicial procedure, which is accustomed to dealing with parties rather than with "questions," and the effect of the decision accords with the development of Dominion autonomy, since it will cut down still further the number of constitutional cases which may go to the Judicial Committee without leave of the High Court. The Judicial Committee has once again justified the belief of Alfred Deakin and his colleagues that they bested the Colonial Office in 1900!

But although the Judicial Committee thus deprived itself of jurisdiction, it elected in view of the length of the argument and the importance of the issue to express the opinion that sec. 46 of the Banking Act was invalid because it contravened sec. 92 of the Constitution, the main provision of which reads: "Trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free." Their Lordships emphasized that they reached this conclusion by considering sec. 46 in isolation, without any context of sections which explained its economic or political significance, since they had to proceed on the assumption that all the sections of the Act giving it such a context were invalid. They laid down some general propositions about the meaning of sec. 92, including a warning that under some conditions a prohibition of the conduct of a business which is inter-state in scope, or a monopolizing of that business by a Government, might be consistent with the freedom postulated by sec. 92, and that the decision of such questions was inescapably economic and political in character. It is a nice question whether these *dicta* are technically *obiter* or not,[27] but in practice it can be assumed that the High Court will faithfully endeavour to apply them. That this will not be easy, however, is shown by the fact that the High Court has already divided four-two on a subsequent sec. 92 problem which should have been capable of determination in the light of

[26] James v. Commonwealth (1936) A.C. 578.

[26a] [1950] A.C. 235.

[27] Their Lordships pointed out that the appellants might yet apply for and obtain a certificate of leave to appeal from the High Court, so that time and money would be saved if the main substantive issue argued were decided now. However, it is very unlikely that the High Court would have given a certificate, and if it had done so, the Judicial Committee would no longer have been considering sec. 46 in the isolation which conditioned its present opinion.

the Bank Nationalization Case, since it was an issue very fully argued therein and had many times arisen in earlier High Court cases.[28]

The interpretation of sec. 92 has passed through many phases. The section began as a politician's slogan to express one of the aims of Australian federation —namely, to introduce "free trade" between the States in place of the "protection" against each others' products which several of them had previously practised. The section had historical antecedents in the Act of Union with Scotland, 1707, Art. IV—("all the subjects of the United Kingdom of Great Britain shall from and after the union have full freedom and intercourse of trade and navigation. . . ."), in a report of the Committee of the Privy Council on Trade and Plantations in 1849 which advocated a customs union between the then unfederated Australian colonies "so that goods might be carried from the one into the other with the same absolute freedom as between any two adjacent counties in England," and in the doctrine of freedom of inter-state commerce which the Supreme Court of the U.S.A. had inferred from the federal commerce power. The early High Court Justices had little difficulty with the section; their historical experience enabled them to detect the odour of protectionism by intuition. But during the First World War, the Court began to find it difficult to police the section without examining the motives of legislators, a task for which judicial technique is quite unfitted. Hence began the attempt to analyse and intellectualize the section which has led to at least five divergent main theories and a mass of irreconcilable decisions. Three of these are decisions of the Judicial Committee,[29] and they have basically incompatible assumptions. Throughout the decisions, one can see two main conceptions of "freedom" struggling for mastery. One is the historical theory on which sec. 92 was actually based—the theory of free trade as contrasted with protectionism. The other is the conception of freedom of enterprise in a regime of "ordered liberty" as distinct from unlimited exposure to government control. Under the first theory, the extinction or nationalization of a business on an Australia-wide scale is irrelevant to the application of sec. 92, since such a policy involves no "protectionism" as between States; a test is to inquire whether the nationalization of the railways in Great Britain would be regarded by either Sassenach or Scot as an infringement of Art. IV of the Act of Union. Under the second theory, the proper function of governments is to regulate trade but not to prohibit it, so that to prohibit the conduct of an inter-state business altogether is inconsistent with sec. 92, although prohibitions of particular actions or individuals (such as bankrupts and minors) may be valid as incidental to regulation. In James v. Cowan,[30] the Judicial Committee was not conscious of these different assumptions, though owing to the way in which the case came before it it approved a High Court judgment—(of

[28] McCarter v. Brodie (1950), Argus Law Rep. 285. The case concerned State transport control legislation which requires, *inter alia,* that inter-state commercial motor truck operators be licensed, prohibits them from operating until licensed and gives administrative authorities a wide discretion to refuse licences in order to "rationalize" competition between truck operators, and between them and the State-owned railways, in the public interest. Legislation of this type had been held valid in a series of High Court decisions which the Privy Council approved, somewhat cryptically, in James v. Commonwealth (1936) A.C. at 621-2, and may have intended to disapprove, even more cryptically, in the Bank Nationalization Case. Such legislation is capable of administrative abuse for "protectionist" ends and judicial remedies against such abuse may be ineffective, owing to the primitive administrative law system which Australia shares with the other Common Law systems. However, the legislation on its face is not protectionist, and the majority of the High Court held, it is submitted correctly, that the Judicial Committee must be taken on balance as having approved the earlier decisions in favour of validity. The dissents of Dixon and Fullagar JJ., holding the legislation invalid, are powerfully reasoned expositions of the "private enterprise" theory of sec. 92 referred to below.

[29] James v. Cowan, James v. Commonwealth (citations given below) and the Bank Nationalization Case.

[30] (1932) A.C. 542. Held that State marketing laws which allow primary producers to market only fixed quotas of their products on the Australian market are invalid by reason of sec. 92.

Isaacs J., as he then was)—in the same case which can be interpreted as supporting the second theory.[31] In James v. Commonwealth,[32] the Judicial Committee became conscious of the ideological dispute and adopted the historical view of sec. 92; Lord Wright said that section 92 prohibited burdens on the inter-state movement of people and their goods "based merely on the fact that they were not members of the same State."[33] But the Board, following its usual practice, did not attempt to overrule James v. Cowan; it attempted instead to give that case a fictitious explanation.[34] In the Bank Nationalization Case, the Board has returned in large measure to the "free enterprise" theory, has treated what Lord Wright in James v. Commonwealth intended to be an exhaustive basis for reasoning as applicable only to the facts of that case, and has put all the emphasis on the inferences to be drawn from the *actual* facts of James v. Cowan rather than on the fictitious explanation of that case given in James v. Commonwealth.[35] It is a typical example of the working of "free judicial research" in the field of constitutional law. The judgment also leaves plenty of room for future judicial research, since it makes reservations[36] which will enable future Courts, if they like, to introduce a new or old theory of sec. 92 under the guise of a "context" of facts removing some fresh problem from the authority of the Bank Nationalization Case.

Since the conceptions of inter-state commerce and its implied freedom in the constitutional law of the U.S.A. influenced the Australian founders, it is not surprising that subsequent U.S. decisions have continued to be quoted in the High Court and relied on in decisions, though the Judicial Committee has notably avoided relying on them. In this the Judicial Committee has shown a nice appreciation of the relevancy of comparative legislation. The U.S. doctrine operates in a constitutional atmosphere which embodies the theory of private enterprise in a system of ordered liberty, and it restricts only the States—not the Federal Congress. Hence each time the Supreme Court gives a more extended meaning to "inter-state trade and commerce," it restricts the scope of State action in relation to such enterprise but extends the scope of Federal power in corresponding degree. Since the Australian section binds both Commonwealth and States, any similar process of extending what is meant by "trade, commerce and intercourse among the States" and by "absolute freedom" under sec. 92 has the effect of removing more and more aspects of the national economy from any kind of legislative control. Australian governments may yet be praying for a U.S. Supreme Court which will return (and induce the High Court to return) to the 19th century construction of the commerce clause[37]—the construction with which the

[31] (1929) 43 C.L.R. at 399. Isaacs J. applied the theory to the effect of sec. 92 on the States, but held that the section did not bind the Commonwealth at all; the dialectic consequences of this view are quite different if sec. 92 is treated as applying in the same *sense* to the Commonwealth as well; hence the approval of Isaacs J.'s opinion by the Judicial Committee has become a grave embarrassment in the present period, when the view that the Commonwealth is immune from sec. 92 has been abandoned.

[32] (1936) A.C. 578. Held that the Commonwealth was bound by sec. 92, and hence could not impose quotas on the export of primary produce from State to State. The legislation was designed to secure the same end as the State legislation held invalid in James v. Cowan, but here there was an express restriction of the amount to be exported inter-state; this measure was adopted on the then prevailing theory that sec. 92 did not bind the Commonwealth.

[33] *ib.* at p. 630.

[34] Viz., that "the Act in question . . . was tantamount to a prohibition of export" (from State to State).

[35] On its actual facts, James v. Cowan can be treated as requiring that legislation must not have the *practical effect* of restricting inter-state trade, even though the legislation is not in any sense "protectionist."

[36] Viz. that the problem is largely political and economic, and that in a suitable social setting even the total prohibition of an inter-state business may be valid.

[37] Or alternatively, that the High Court will act on the view, occasionally expressed by individual Justices, that the history, sociology and logic of the American doctrine are so different that no decision on any part of it can safely be applied to the Australian section.

Australian Founders were familiar, and which they expected to see applied to the interpretation of their sec. 92.[37a]

Thus the somewhat hasty attempt of the Australian Federal Labour Government to defeat a technical judicial doctrine by a bold political move was itself defeated by another judicial doctrine. The defeat, however, was not final and may have been unnecessary. The States which intervened to support the private Banks did so, *inter alia,* on the ground that the private banks were necessary to the independent conduct of State government finance, and that therefore on a broad interpretation of the doctrine of inter-governmental immunities revived in the State Banking Case, bank nationalization was invalid as interfering with essential functions of the States. Dr. H. V. Evatt, K.C., Attorney-General for the Commonwealth, who conducted the argument in favour of the legislation throughout the High Court and Judicial Committee proceedings, took the opportunity of making a root and branch attack on the doctrine of the State Banking Case; the High Court held that the doctrine was established, but that the interference with the States, if any, caused by this measure was too remote and involved no element of discrimination, so that the doctrine did not apply. The matter was again argued in the Judicial Committee, which made no reference to it in its opinion. It is possible that if the Chifley government had amended its legislation to provide simply for the acquisition of the private banks on terms satisfactory to the High Court of Australia, and had omitted the prohibition section altogether, there would have been no doctrine to prevent that acquisition from becoming effective. The opinions of the High Court and of the Judicial Committee give little guidance on the relation of compulsory government acquisition to sec. 92, but Mr. R. G. Barwick, the brilliant King's Counsel from New South Wales, who argued the case against the legislation throughout, and who urged so persuasively the "ordered free enterprise" theory of sec. 92, had difficulty in suggesting how even the strictest Spencerian view of that section could prevent acquisition for the use of the Commonwealth, when once it was conceded that Governments might properly conduct a trading bank at all.[38] The prohibition section—section 46—of the Banking Act which led to all this subtle judicial modification of sec. 92 may not have been necessary. It was rather akin to the restrictive covenant designed to protect the purchaser of a business from the competition of the vendor, and it is doubtful whether, after acquisition on this scale any of the private banks would have tried to start afresh.[39] Nor is this the only ironic feature of the case. Dr. Evatt, A.G., who argued this case had, as Evatt J. on the High Court, done a great deal to establish the "free trade" concept of sec. 92 which the Judicial Committee adopted in James v. Commonwealth. Lord Wright, who wrote the judgment in James v. Commonwealth, presided at the Board meeting which gave leave to appeal in the Bank Nationalization Case, but he was not well enough to sit at the hearing of the appeal. Lord Uthwatt, who was Australian by birth and early education and might have been able to share the historical "feeling" for sec. 92 which inspired the argument of Dr. Evatt, was a member of the Board which heard the appeal but died during the hearing, as did Lord DuParcq. The Federal Labour Government was defeated at the polls very shortly after the Judicial Committee published its reasons for decision, but the public opinion surveys, which are a good

[37a] For example, U.S. decisions up to 1900 denied that banking and insurance were part of inter-state trade and commerce, and the Australian Founders probably acted on that assumption. But in U.S. v. South-Eastern Underwriters' Association [1944] 322 U.S. 533, the U.S. Supreme Court held that insurance and by inference banking must now be treated as within the scope of the inter-state commerce power, and the High Court and Judicial Committee have now correspondingly held that banking (and by inference insurance) are within the protection of the Australian sec. 92.

[38] The Commonwealth has express power to acquire property; Con. sec. 51 (XXXI); and its power to conduct a bank now seems beyond dispute.

[39] The prohibition issue, however, was a good one for testing at their highest the "free trade" and "private enterprise" theories of sec. 92.

guide in a country with compulsory voting, lead one to suspect that bank nationalization had by then become only a minor issue in the political situation. Hence the Case of Bank Nationalization had a somewhat indecisive end, legally and politically, but its politics as recorded in the *Round Table* and its law as recorded in the Law Reports will remain of abiding interest to the student of comparative federal institutions.

LAW AND JUDICIAL PRACTICE IN ISRAEL

[*Contributed by* DR. J. SUSSMANN, *Judge, District Court, Tel Aviv.*]

ON the last day of the British Mandate, on May 14, 1948, the Provisional State Council of the Jewish State met in Tel Aviv. The circumstances in which the new State had come into being had made the holding of elections impossible. The Council was, therefore, not an elected but an appointed body, the composition of which had been agreed by all Jewish political parties according to an assessment of their strength. The Council assumed the function of legislation, and after proclaiming the State, the proclamation to come into effect at Midnight so as to avoid conflicting with the Mandate, passed a Provisional Constitution styled Government and Law Organization Ordinance, No. 1 of 1948 (hereinafter referred to as "the Ordinance"). Under the Mandatory Regime, the country had been administered under the Palestine Order-in-Council, 1922, made by virtue of the Foreign Jurisdiction Act, 1890, and a number of subsequent amendments. Legislative enactments made by the High Commissioner under the Order-in-Council were called "Ordinances", there was no elected Legislative, and there were, therefore no "laws".

The Provisional State Council continued the use of the word "Ordinance" so as to indicate that it was not an elected legislative, and it was only after the Constituent Assembly was elected and took office in February, 1949, that Laws began to be enacted by this Assembly.

The Ordinance is divided into seven chapters, dealing with Administration, taxation, legislation, law, Judicature, Armed Forces and various transitory provisions, respectively. The First Chapter confirms the establishment of the Provisional State Council, and sets up a Provisional Government, to be responsible to the Council. Chapter Two affirms the rule that no taxes may be levied without the authority of an Ordinance, and that the budget must be passed by Ordinance. In the Third Chapter, the Council assumes the functions of legislature, empowering the Provisional Government in Article 9, in the event of a state of emergency being proclaimed (which was done forthwith), to legislate by Emergency Legislation. Any Emergency Legislation is, however, limited for a period of three months, unless the validity thereof is extended by the Council.

Article 46 of the Palestine Order-in-Council, 1922, had defined the law to be applied in Palestine. This consists, in the first place, of such Ottoman Laws as had been in force before Turkey entered the war, on November 1, 1914, and such later Ottoman Laws as were to be declared by Public notice, to be in force. The second body of Palestine Law, according to that Article, was to consist of Imperial Orders-in-Council applicable to Palestine, of Ordinances made by the High Commissioner, and other local regulations. Any lacuna left is to be filled in conformity with the substance of English common law, and the doctrines of equity in force in England, "so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary."

Although the Ottoman Law was inadequate to regulate conditions of a modern society built on totally different foundations, while English law had been shown, in a number of instances, to be not suitable, it was obviously impossible, on May 15, 1948, to make any immediate drastic changes. The Palestine Order-in-Council was left, and is still in force, and Section 11 of the Ordinance provides

that the law in force on May 14, 1948 shall continue to have effect unless varied by this Ordinance or subsequent legislation, but subject to "such changes as may result from the establishment of the State, and the authorities thereof." Two sets of provisions of the Mandatory legislation were retroactively repealed, these are the Land Transfer Regulations, 1940, whereby Jews were prohibited from buying land in part of Palestine, and part of the restrictions placed on Jewish immigration. It was further declared that every Jew[1] who had entered the country while the Mandate was in force, whether or not a legal immigrant, was to be deemed legally in the country.

The Courts established under the Mandatory regime continued to function under the Ordinance. There was, however, no Supreme Court left as the previous Supreme Court had consisted mainly of British Judges, but an Israel Supreme Court was eventually appointed in September, 1948, and it exercises the functions hitherto discharged by the Supreme Court of the Mandatory administration.

Under various Defence and Emergency Regulations, the Mandatory Government had acquired wide powers of administrative arrest, and requisitioning of property, and as such regulations had not been repealed the question soon presented itself whether such powers could now be exercised by the Israel authorities. By virtue of Section 111 of the Defence (Emergency) Regulations, 1945, a Military Commander may by order direct the detention of any person in administrative custody. In July, 1948, the validity of a detention order made under this provision by the Acting Chief of Staff, Israel Forces, was challenged in habeas corpus proceedings. The Defence (Emergency) Regulations had, of course, been enacted by the British administration to meet totally different circumstances, but when the new State was established, it found itself immediately in a state of emergency which called for the exercise of powers similar to those hitherto enjoyed by the former administration. It was held that the Chief of Staff, Israel Forces, as General Officer Commanding had inherited the powers of the British Commander-in-Chief, such being "a change resulting from the establishment of the State" as contemplated by Section 11 of the Ordinance, and the Court rejected the argument of the Petitioner that Mandatory Emergency Regulations could no longer be applied: *cessante ratione non cessat lex ipsa.*

As a rule of practice, British judges had introduced the English doctrine of precedent in Palestine. The majority of lawyers practising in the country had, however, had their legal education in continental countries where this specifically English doctrine is unknown, and they had, therefore, always been somewhat reluctant to follow it. All three District Courts in Israel have, in some form or other, expressed doubts whether they are bound in law to follow judgments of the Mandatory Judiciary. On principle, there can be no room for such doubts. It is perhaps not generally recognized here that the binding force of precedent is derived from the fact that the pronouncements of the judges form part of the law of the land, and that having been the position while Palestine was under British administration, it is difficult to see how the position could now be otherwise, having regard to Section 11 of the Ordinance. It is, of course, true that Palestine has had no development of a "common law" of its own of which the binding force of judicial decisions is the corollary, but though the Israel Supreme Court has not specifically decided the matter, it seems now tacitly to be established that judgments emanating from Courts set up under the Mandate have the same force of law as heretofore. In the large majority of cases decided by the Israel Supreme Court, references will be found to decisions of the Palestine Supreme Court, and judgments are based thereon. At the same time, however, there is a certain tendency to depart from such decisions, either by "distinguishing" cases on their particular facts, or by pointing out conflicting decisions of the previous court, which now enable the Court to adjudicate untrammelled by any view previously expressed.

[1] There is, however, neither in the Ordinance nor elsewhere any definition of a Jew, Is it a member of the Jewish race, or of the Jewish Religious Community?

In 1943, the Supreme Court had held that the lessor of an empty space of land was protected by the Rent Restrictions (Business Premises) Ordinance, 1941, such space not being "Premises" within the meaning of the Ordinance. Basing itself, *inter alia*, on the definition of "premises" in The Licensing Act, 1872, the Public Health Act, 1875, and the Spirits Act, 1880, the Israel Supreme Court has now ruled otherwise. The binding force of the previous decision was apparently, though not expressis verbis, got over by the fact that the 1943 decision had been reversed by the Privy Council, although on different grounds.

The Palestine Order-in-Council, 1922, conferred a certain amount of jurisdiction in matters of personal status on Religious Courts of various communities. By Section 53 of the Order-in-Council, the Rabbinical Courts of the Jewish Community are to have exclusive jurisdiction in matters of "marriage and divorce alimony and confirmation of wills of members of their community other than foreigners." In 1928, the Special Tribunal[2] had ruled that the word "alimony" appearing in Section 53 should be interpreted in the sense it bears in English law, the enactment having been drafted by an English legislating authority. Following this decision, it was later held by the Supreme Court that payments for the support of a wife, where the marriage had not been dissolved, and the parties had not been separated by judicial decree or by consent, were not alimony but maintenance, and as such it was not a matter of which a Rabbinical Court could take cognizance. Jewish Religious Law would, however, regard the claim as one for alimony. A majority of the Israel Supreme Court has now departed from the view expressed by the Special Tribunal in 1928, and has held that it was for the Religious Court to say what it would consider as alimony. Since the matter involves, however, a conflict of jurisdiction between Civil and Religious Courts, the Special Tribunal will be convened again to decide thereon; pending such decision the opinion expressed by the Supreme Court is not yet law. If upheld by the Special Tribunal, it may lead difficulties in practice on an unprecedented scale. Since 1928, the Civil District Courts have adjudicated on claims for maintenance, viz. claims for support of a wife where marriage subsists, and no matrimonial suit for divorce or judicial separation is pending, on the ground that such claims did not come within the definition of alimony, as laid down by the Special Tribunal. Should it now be held that this was wrong, these judgments will turn out to have been given without jurisdiction; execution thereof will have to be stayed, and litigation will start anew in the Rabbinical Court.

Since Article 46 of the Order-in-Council, 1922, is still law, the Israel Courts may still resort to English common law and equity within the limits set by that Article. A recent decision of the Supreme Court exhaustively reviews previous judgments, and in the light of English practice, considerably enlarges the remedy of specific performance of contracts for the sale of land, which relief the Mandatory Courts had only reluctantly granted. In another judgment, the Supreme Court has now held that equitable relief against forfeiture was not available in the case of a statutory tenancy, since "equity follows the law," and could therefore not extend the protection of tenants which the statute had limited.

THE TEACHING OF COMPARATIVE LAW IN U.S.A.

[*Contributed by* PROFESSOR R. H. GRAVESON.]

IN the summer of 1949, under the auspices of the University of London, the writer undertook a brief inquiry into the teaching of comparative law in certain American Universities.[1] He would like first of all to place on record his appreciation of the

[2] This is a Tribunal consisting of two Puisne Judges and the Chief Rabbi; it is convened under Section 55 of the Order-in-Council to decide on the limits of jurisdiction between Civil and Religious Courts whenever the matter is in issue.

[1] Unfortunately time was insufficient to allow the writer to visit either the Parker School of Foreign and Comparative Law of Columbia University or the Institute of Comparative Law of Tulane University, at which important work in this field is being done under the direction of Professor de Vries and Professor F. F. Stone respectively.

kindness and spirit of co-operation shown to him by all those lawyers and law teachers who submitted with such patience to his questioning. While the following impressions which he thereby gained cannot claim to be of general validity, it is hoped that they are at least representative. From them it may be possible to draw a lesson for the development of the study of comparative law in England.

The idea of teaching the institutions of two or more legal systems on a comparative basis (somewhat inaccurately called "comparative law") is receiving increasingly wide support in the leading American law schools, though their practice in carrying out the idea in certain cases appears to fall short of their ambitions. In general little attention is paid to the subject in most of the State Universities, yet paradoxically the University of Michigan, a State University of the Middle West, contains one of the most outstanding schools of comparative law in America. A further exception occurs in the Louisiana State University, though the attention paid to the common law in that civil law State is rather less than an outsider might have expected. The absence of courses on comparative law in many of the Canadian universities must cause surprise, particularly in the case of those in the civil law Province of Quebec—Laval, McGill and the University of Montreal, in which one would have imagined an ideal situation for the practical teaching of comparative law to exist. Such neglect is only equalled in the United Kingdom, where the fruitful comparative values of English and Scots law are mutually and consistently ignored.

While most American academic lawyers appear to be agreed in principle on the desirability of teaching law comparatively, their techniques of instruction vary in detail. Similar wide support exists for comparative research in foreign legal systems, though the material facilities requisite for such work limit its possibility to the larger libraries of foreign law.

In 1948 the Committee on International and Foreign Law of the Association of American Law Schools took an important step in investigating the extent, the practice and the possibilities of teaching comparative and international law by organizing a two weeks' Institute in New York devoted to the consideration of these problems. The account of these meetings given by Dean Phillip W. Thayer[2] indicated that sixteen American law schools were offering courses in comparative law, though great divergencies existed in both aims and methods. The resolutions of the Institute[3] demonstrate a full realization of the importance of the subject and practical enthusiasm for the future development of its teaching.

In short, legal isolationism, like its political counterpart, is on the decline in the United States. This is particularly noticeable in the field of conflict of laws. Although in its foundations the American conflict of laws, particularly as expounded by Story, drew extensively on Continental sources (there being few others on which to draw), its development and teaching have been predominantly of an American inter-State conflict of laws, not as a subject synonymous with private international law in either the English or Continental sense. Today, largely through the influence of a few men like Professor Lorenzen and Professor Yntema, through the teaching of Continental scholars such as Professor Rheinstein and Dr. Rabel, as well as through the experience of eminent practitioners like Mr. Phanor J. Eder of the New York Bar, increasing attention is being paid to the conflict of laws in its international sense. To the American lawyer the outstanding difference between the two similar systems (apart from the greater frequency of inter-State cases) is that the inter-State conflict of laws involves questions of constitutional law under the Full Faith and Credit and other clauses of the Constitution, whereas the international conflict of laws does not. The counterpart in the latter to the constitutional problems of the former lies now however, in such international institutions as the Marshall Plan and the Havana Charter, institutions of the modern economic world which make necessary a wider

[2] *The Teaching of International and Comparative Law*, 1 Journal of Legal Education 449.

[3] *Id.*, 450, 451.

knowledge of conflict of laws. Both academic lawyers like Professor Cooper of the University of Washington and legal counsel of important manufacturing and export firms testified to this widening of the American legal horizon.

The various aspects of teaching law comparatively may conveniently be summarized under the heads of (1) the teachers, (2) the students, (3) the subject-matter and technique and (4) research. Under the last head a word may be added on the matter of institutes of comparative law.

1. The Teachers.—It seems almost axiomatic that a person who professes to teach a legal topic comparatively should be reasonably well qualified in both or all of the legal systems with which he will deal, or at least in those branches of the systems which form the subject of his instruction. The chief directions of American interest in the field of foreign law lie in the civil law systems of Pan-America and, paradoxically enough, in Soviet law. In both these fields the leading exponents are men with basic common law training. Despite the presence in the U.S.A. of at least two outstanding comparative lawyers of Continental origin and training, Dr. Ernst Rabel of Michigan Law School and Professor Rheinstein of Chicago, the view was expressed to the writer by several eminent law teachers, including Dean Griswold of the Harvard Law School, that where the teaching of comparative law was to involve the common law, it should be done by a common lawyer who had received subsequent training in some civil law system, rather than the reverse. The reason for this view was that civil lawyers frequently experienced the greatest difficulty in understanding the common law approach to problems, partly because of their unawareness of their failure to acquire the common law mind. There were admittedly very notable exceptions, but the principle was too strong to be ignored. In accordance with that principle the Harvard Law School in 1946 appointed one of its own recent graduates, Mr. Arthur von Mehren, as professor of comparative law and at once sent him to Europe for three years to learn at first hand something of the French, German and Swiss legal systems. Meanwhile the activities of Harvard in the comparative field have been concentrated on Soviet law under the able guidance of Professor Berman. Professor von Mehren's courses in comparative law at Harvard began with the session 1949-50. Another outstanding example of a dual legal training is Professor Hazard of Columbia University, who after a basic common law training in America studied Soviet law in the U.S.S.R. for several years, and has achieved a very high reputation for his courses on the comparison of American, English and Soviet institutions. At the moment comparative law is not being taught at Yale.

Needless to say, civil lawyers do not subscribe with enthusiasm to the opinion expressed above. Against that view of the well-trained teacher may be set the proposition that the Continental lawyer takes more kindly and readily to comparative law than does his common law brother. One has only to glance at Continental text and periodical literature to appreciate this fact. The civil lawyer's international environment conditions his legal outlook and gives him a frame of mind well suited to a comparative picture. But it gives him also the dangerous tendency to regard legal systems as fundamentally similar when, so far as the common law is concerned, there exist differences so deep that a sympathetic understanding of Anglo-American law is not achieved without difficulty. But when that difficulty has been overcome, through training, practice, teaching and living in a common law country for a long enough period, the result may well be a comparative lawyer of such outstanding abilities as Max Rheinstein, whose course at the University of Chicago on the comparative law of torts has achieved the highest reputation in the United States.

It may be that it is easier for a common lawyer to understand a civil law system than for a civil lawyer to understand the common law, though the writer, being a common lawyer with knowledge of only one civil law system, is hardly in a position to make such a sweeping generalization. Nevertheless, it seems reasonable to suggest that a common lawyer subsequently trained in some

civil law system would be better able to teach a subject comparatively to students whose basic training is in the common law than would a teacher who first learned civil law. For students trained in the civil law the converse would obviously be the case. In both cases there would be a fundamental and sympathetic basis of understanding which would assist tremendously in the appreciation of foreign legal institutions. Perhaps the ideal arrangement for teaching comparative law would be to have the collaboration of a civil and a common lawyer in the instruction of the same group of students. It is not known whether this experiment has ever been made, but with careful planning and co-ordination it might hold fruitful possibilities. It has certainly achieved considerable success in comparative research, as in the recent work of Dr. Rabel on the conflict of laws,[4] in which he has acknowledged his indebtedness to the common lawyers who have helped him. Quite apart, however, from the obvious comparison of the principles of common and civil law, a tremendous field of untold possibilities exists for the pure common lawyer in a comparison of his native system as it has developed throughout the common law world. Teaching and research on this basis would, after all, be no more than the counterpart to the traditional field of interest of Continental comparative lawyers, who still devote most of their attention to the ramifications of civil law in those countries which have adopted that system. While there is need for a deeper mutual understanding between the civil law and the common law, even within the United Kingdom, that need should not overshadow the vast unexplored territory of comparative common law.

2. The Students.—Comparative law in a full sense is not every student's meat though every student must profit greatly from comparative references which could, and frequently do, illuminate the various branches of English law which he studies. Apart from such references in the general body of English law, apart also from the awareness of one foreign system which the student obtains through elementary Roman law, certain subjects necessarily involve extensive legal comparisons. The outstanding example is the constitutional laws of the British Empire, and others which readily come to mind are the conflict of laws and, in a more abstract sense, legal theory. For comparative law as a special subject, however, involving the study of some branch of a foreign system side by side with the corresponding branch of common law, a higher academic status than that of undergraduate is desirable. Dr. Ernst Rabel, with the full weight of his authority and experience, expressed to the writer his opinion that students of comparative law should preferably be post-graduate and, if possible, also professionally qualified. It is appropriate here to pay tribute to the valuable contributions which foreign students have made to the understanding of the comparative aspects of subjects taught for post-graduate degrees in the University of London, and within the writer's experience, particularly in the conflict of laws. In almost every case such foreign students, already academically or professionally qualified (and frequently both), have been able to explain to seminar classes the corresponding institutions of their own legal systems, to the great benefit of all who heard them. The moral needs no emphasis. What may, however, be stressed, is the need for careful selection of students of comparative law, a selection for which not only an existing legal qualification but, where a civil law system is to be considered, a satisfactory knowledge of at least one foreign modern language, appear to the writer as minimum requirements.

3. The Subject-matter and Technique.—The two major possible approaches to the teaching of law comparatively may be designated as the general and the particular. The former seeks to compare the fundamental principles of the relevant systems over their whole field, and may even approach the comparative theory of law. The particular approach, on the other hand, takes one branch

[4] The Conflict of Laws: a Comparative Study (1945), Vol. 1, Foreword and Preface. See also Rabel, An Interim Account on Comparative Conflicts Law, 46 Michigan Law Review, 625.

of law, such as torts or taxation, or even one narrower specific topic such as legitimation or registration of title, and presents a comparison of the treatment of such matters in two or more systems. American teachers are almost unanimous in favouring the latter method, of which Professor Rheinstein's course in torts is a good example.[5] For not only does it carry with it incidentally a contrast of fundamental ideas, but leads to the search for solutions of specific problems along the converging lines of the various systems—converging, that is to say, in many cases; for, as Dr. Rabel observed, although the techniques of different systems of law varied greatly, the results which they attained were very often strikingly similar. Another aspect of the value of comparative law was illustrated by Professor Rheinstein, who advocated a careful use of foreign materials in teaching conflict of laws as leading to the practical application of the relevant law, not merely the general choice of the relevant legal system to govern a particular transaction. He especially favoured the selection of a few concrete cases, the results of which would be calculated to surprise the student, and he further recommended reference to decisions of the International Court of Justice as raising the question of what system of conflict of laws was applied by that Court.

The choice of subject or branch of law should, it is considered, be based primarily on the contrasts which it affords with English or American law, not on its similarity to those systems. Subject to this general condition (to which exceptions must, of course, exist), it seems to matter little what particular topic is selected for study, provided it is within the general field of interest of the students. To this, however, there is a qualification which was stressed by most American authorities and particularly by Professor Kurt H. Nadelmann of the University of Pennsylvania. The greatest importance is attached to an understanding of the foreign law of procedure, for principles of procedure draw the pattern of effective substantive rights in the civil law no less than in the common law, and the solution of specific problems in any branch of law necessarily presupposes a knowledge of procedure if the ultimate solution of such problems lies in the outcome of litigation. Dr. Rabel, too, favoured the casuistic method of selecting particular problems and asking for their solution in several different legal systems.

A psychological point of some interest which, it is thought, would have far less validity in England than in the United States, was raised by Professor Nadelmann. He had found in the practice of teaching comparative law that a comparison in one field to the detriment of one's native law required for students an advantageous comparison in some other field. In this connection he had found the law of procedure a welcome antidote to an apparent superiority of particular institutions of foreign law: one could, for example, associate in certain civil law systems the absence of capital punishment with the presumption of guilt. In England Bentham's rejection of the idealization and perfection of the common law as the embodiment of reason has left a modern heritage of scepticism. In this atmosphere it is considered that a detrimental comparison of the common law, provided that it satisfied the unspoken essentials of fairness, accuracy and completeness, would cause neither surprise nor consternation among English students. It might rather have the effect of stimulating further comparisons.

4. Research.—This much-abused term, in its strict and accurate sense of the pioneering discovery of new or previously unknown legal material, finds a relatively small place in the day-to-day use of the comparative method. But in a wider and more general sense research is being increasingly undertaken in the United States, and notably in the Law School of the University of Michigan, in the collation of related branches of foreign systems of law. Under the experienced

[5] Cases and Materials on the Law of Torts from Common Law and Civil Law Countries, University of Chicago, 1940/47.

hand of Professor Hessel E. Yntema, for example, very considerable work is being done to present in English the law of most of the South American countries relating to one specific branch of commercial law, a major undertaking which is being assisted by several South American lawyers engaged on research at Ann Arbor.

Of a somewhat less comparative nature in itself is the project of presenting in English to the common lawyer translations of foreign codes. In a remarkably able recent work,[6] the Michigan Legal Studies series has published a translation of the Soviet Civil Code together with a nine-hundred page commentary upon it by Dr. Vladimir Gsovski, Chief of the Foreign Law Section of the Library of Congress, and obviously much more could and will be done in this direction in respect of other legal systems. While hardly comparative in themselves, pure translations of foreign codes have great value in providing in readable form the raw material for the would-be student of comparative law, a value which is inestimably increased if, as in the case of Gsovski's work, the translation is accompanied by a comparative commentary. It should not be too much to hope that in the foreseeable future the main bodies of the world's legal systems will be available in one or other of the French and English languages. Here, indeed, is a task to which the English and American jurist might well turn his attention. There is no lack of legal ability. Unfortunately however, except in all too rare cases, there is simply lack of funds available for such comparative work.

An important practical aspect of research in comparative law is the establishment of institutes devoted to that subject. The writer is unaware of the existence of such an institute either in the United States or the United Kingdom. In America the need for an organization able to provide for courts, lawyers and government departments expert information of foreign law and to conduct useful research has been voiced by Dr. Rabel,[7] the distinguished former Director of the Kaiser-Wilhelm Institute for Foreign and International Private Law. Such an institute, like any other centre of research, requires a good library of foreign law; and if it is to undertake the giving of factual statements of foreign law, a well-paid and highly-qualified staff is needed. But one may ask whether something of the kind could not be attempted in a modest way in England. In the Institute of Advanced Legal Studies of the University of London there exists an organization already devoted to post-graduate study and research, possessing premises and a library daily growing richer in the materials of foreign law. For precedents we have the memory of a successful experiment in the Kaiser-Wilhelm Institute in Berlin. We have before our eyes the living example of the Hellenic Institute for International and Foreign Law under the distinguished presidency of Professor Vallindas, who is inviting the collaboration of eminent foreign jurists in their own special fields. We have the establishment under UNESCO of the Committee on Comparative Law, which numbers among its members England's most distinguished comparative lawyers. The years to which Professor Gutteridge has devoted his advocacy of comparative law are now beginning to repay his labours in the recent establishment of a chair of comparative law and the extension of teaching of the subject from Cambridge to Oxford, Birmingham, Manchester and London. The time seems ripe for the establishment in England of some organization, on however small a scale, which will play its part in representing the common law in the comparative field in a world in which the knowledge of foreign law is no longer an academic luxury, but has become a practical necessity.

[6] Gsovski, Soviet Civil Law, Vol. 1, 1948, II, 1949.

[7] 47 Columbia Law Review 227 (1947). It should be noted that the work of such Institutes positively excludes the giving of advice and opinions on the merits of a case or the prospects of litigation, and is limited to purely factual information of what the foreign law is on any particular matter.

THE PUBLIC LAW OF OVERSEAS FRANCE SINCE THE WAR

[*Contributed by* K. E. Robinson, Esq.]

I. Before 1939.—Before 1939, British comment on French colonial policy seldom failed to contrast the British system "with its haphazard complexity and lack of co-ordination on any structural basis"[1] with the logical simplicity and uniformity assumed to characterize the French. But this view was not very exact. "On s'est trop souvent plu à opposer l'empire britannique, compliqué et multiple, à la structure simple et rationnelle de l'Etat français. En fait, la structure de la République impériale française ne le cède guère en complexité à l'empire britannique."[2] There was a long history of colonial policy in France, and its main characteristic was a sort of counterpoint on the theme of *assimilation*, the policy that "colonial peoples were to absorb French culture so that they might become Frenchmen and French citizens; the colonies were to become overseas parts of France"[3] and, as such, their economic relationship with France and with other French colonies, their constitutional position and their administrative organization were to be identical with those of any part of France itself.

Assimilation, which was in origin the Revolutionary reaction to the old colonial regime of *le grand siècle* was, in fact, frequently in retreat, and perhaps never more so than in the last thirty or forty years of the Third Republic. Its rather short-lived successes, under the Convention, again during the Second Republic, and again in the early years of the Third Republic, certainly left their marks, but these were somewhat unevenly distributed, both territorially and institutionally. Although the egalitarian ideals summed up in *assimilation* remained the Radical touchstone of colonial policy all through the Third Republic —and thus, in a sense, the prevalent ideology in colonial matters—the vast territorial additions made to the French Empire during that period, with their considerable populations of peoples far removed from Western European models, compelled a practical policy which recognized increasing divergences from the largely illusory uniformities of *assimilation*. French commentators describe the resulting mixture of policies as *association*. "En maintenant sur des peuplades arriérées un certain assujettissement adouci au fur et à mesure de leur développement intellectuel, en cherchant chaque fois que cela était possible à assimiler les hommes, en reconnaissant à la colonie une certaine autonomie administrative et économique, la IIIe République sut concilier les trois tendances principales de la colonisation en un effort de synthèse auquel on a donné le nom de 'politique d'association.' "[4] In fact, *association* was little more than *assimilation* tempered by varying degrees of concession to existing conditions. "La pratique coloniale suivie par nous depuis 1871 représente une infinité de dosages différents des deux principes d'autonomie et d'assimilation; ces dosages ont varié non seulement d'une colonie à l'autre, mais au cours du temps en ce qui concerne le même territoire."[5]

To understand and assess developments in the public law of Overseas France since the war, it is essential first to recall some of the principal features of the legal structure which had, in 1939, resulted from this interplay of largely contradictory features. Four main topics must be considered for this purpose, namely (i) citizenship, (ii) representation at the centre, (iii) the sources of law, or, as the French call it, *le régime législatif*, (iv) colonial assemblies.

Citizenship in 1939.—Before the war, citizenship, which was not merely a question of natural status but involved the exercise of political rights, was closely associated with the attainment of a certain degree of cultural assimilation, and

[1] Amery, L. S., at the Colonial Conference, 1927. *Cmd.* 2884, p. 5.
[2] Devèze, M., *La France d'Outre-Mer*. Paris, 1948, p. 11.
[3] Walker, E., *Colonies*. Cambridge, 1944, p. 101.
[4] Luchaire, F., *Manuel du Droit d'Outre-Mer*. Paris, 1949, p. 78.
[5] Lavergne, B., *Une Révolution dans la Politique Coloniale de la France*. Paris, 1948, p. 60.

the acceptance of French private law. "Citoyens, sujets, protégés, administrés vivaient inégaux à l'ombre du même drapeau. . . . La citoyenneté était restée longtemps l'apanage d'une faible partie de nos populations d'outre-mer: habitants de Sainte-Marie de Madagascar et des quatres vieilles colonies (Martinique, Guadeloupe, Guyane, Réunion), natifs de l'ancien royaume de Pomaré (Tahiti, Iles sous le Vent, Tuamotou), originaires des quatre communes de plein exercice du Sénégal. Seuls ces rares privilégiés pouvaient dire: 'Je suis citoyen français.' . . . Le plus grand nombre des ressortissants de nos possessions d'outre-mer n'avait que la qualité mineure de 'sujet' ou de 'protégé français.' Ceux qui désiraient devenir citoyens devaient soit se faire naturaliser, s'ils étaient nationaux d'un pays de protectorat, soit solliciter une mesure individuelle soumise à des conditions d'âge, de culture, de service militaire, s'ils étaient sujets de la République. Ils devaient, en outre, renoncer à leur statut personnel. La décision était généralement sollicitée par voie administrative. La signature du décret qui l'entérinait restait dans ce cas discrétionnaire. La procédure dans certains territoires, A.O.F., Madagascar, Algérie, pouvait prendre la forme judiciaire. Les conditions à remplir étaient alors plus strictes, mais si elles étaient réunies le tribunal ne pouvait refuser l'accès à la citoyenneté."[6] The fact that the acquisition of citizenship necessarily involved the renunciation of *statut personnel,* i.e. the acceptance of French private law, was one of the fundamental grievances of so-called "nationalists" in French territories, especially the Muslims of North Africa and, to a lesser extent, in Madagascar.[7] In the African colonies, non-citizens, with a few exceptions, were subject to what was called the *indigénat.* The essential features of this regime were that, quite apart from the ordinary criminal law, offences punishable by not more than 15 days' imprisonment or a fine of not more than 100 fr. (1939) might be created by the Governor, and persons subject to it were liable to trial and conviction for such offences, not by the courts, but by the administration.[8]

Representation at the Centre in 1939.—One of the features peculiar to the French Empire in pre-war days was the inclusion in Parliament of representatives of some of the colonies. The three "old colonies," whose special legislative regime has just been noticed, each returned one senator and two deputies, while four other territories, which resembled the "old colonies" in certain other respects —namely, Guiana, Senegal, Cochin China and French India—each returned one deputy. Algeria, which was not regarded as a colony, returned nine deputies and three senators. The significance of the representation of Overseas France in the pre-war metropolitan Parliament has not infrequently been exaggerated by foreign commentators. Boisdon asserts that in 1936 there were only 432,122 registered electors, out of a total population of some 70 million, returning 20 of the 612 deputies.[9] But in addition to this representation in metropolitan assemblies, which was, of course, an aspect of *assimilation,* there had been established, from time to time, when *assimilation* was temporarily reversed, a Consultative Council for the Colonies. In this, as in other respects, the colonial policy of the Third Republic was "mixed": it re-established parliamentary representation for

[6] Boisdon, D., *Les Institutions de l'Union Française.* Paris, 1949, pp. 66-67.

[7] Only the *originaires* of the four communes of Sénégal (Dakar, Gorée, Rufisque and Saint-Louis) possessed the rights of French citizens and the right to retain their *statut personnel.* The *originaires* of the French *établissements* in India could vote in their own country in the election of a deputy while retaining their *statut personnel* and could, moreover, acquire full citizenship by a simple declaration of *renonciation du statut personnel.*. v. Rolland, L. et Lampué, P., *Précis de droit des pays d'outre-mer.* Paris, 1949, 265-267. The position of the natives of the island of Sainte-Marie de Madagascar in respect of citizenship and *statut personnel* was the subject of conflicting judgments, though the Chambre Criminelle of the Cour de Cassation held, in 1924, that they were *citoyens de statut français.* v. Recueil Penant, Tome 53, pp. 89-93. Note by J. Brethe de la Gressaye.

[8] Devèze, *op. cit.,* p. 76. Rolland et Lampué, *op. cit.,* p. 306.

[9] Boisdon, *op. cit.,* p. 10.

the older territories, but it also reinstituted the special Consultative Council for all overseas territories except those in North Africa. This Council, which did not meet at all between 1886 and 1920, when it was "reorganized," was composed of the senators and deputies of the older territories, representatives elected by the French citizens in other territories, and representatives of the idigenous populations and some members nominated by the Government. Of it, it was not unfairly said that it was so dead that even the dead were included in its membership.

The "Régime Législatif" in 1939.—The Constitution of 1875 contained no special provisions about colonial laws. It was in consequence held that the law of the Second Empire remained in force. Under that law, power to legislate for the colonies was a prerogative of the Senate, and accordingly a Sénatus-Consulte[10] of 1854 had prescribed different forms of legislation in the three "old colonies" of Martinique, Guadeloupe and Réunion according to the importance of the subject. It also remarked that "les colonies outre que la Martinique, la Guadeloupe et la Réunion seront reglées par décrets de l'Empereur jusqu' à ce qu'il ait été statué à leur égard par un sénatus-consulte." No such sénatus-consulte was ever made. After the disappearance of the Empire, the Senate made no claim to any special power in colonial legislation and there was nothing to prevent Parliament from legislating, in the ordinary way, on any subject at all either for the "vieilles colonies" or for "les autres colonies." The position under the Third Republic was, therefore, that on certain matters, laws for Martinique, Guadeloupe and Réunion could only be made by statute (viz. those subjects for which, according to the *Sénatus-Consulte* of 1854 either a *Sénatus-Consulte* or a *Loi* were required) while in the other colonies—constantly increasing after 1870—a decree was sufficient for any legislation. Parliament could, of course, legislate for all the colonies on any subject if it so decided. Laws emanating from the central authorities, whether statutes or decrees, do not become effective in the colonies merely in virtue of their promulgation by the President and publication in France, unless they are statutes (*loi*) which by virtue of their subject specifically apply to overseas territories as such. All laws, other than such special statutes, must be promulgated by the Governor and published in the colony before they are operative. The Governor is undoubtedly under an obligation to promulgate both statutes and decrees applicable to his territory, but no period within which this must be done is prescribed. He can therefore hold up the coming into force of any law other than a statute which is, by reason of its subject, applicable overseas *de plein droit* for quite a time, and the only sanction is a direct order from the Minister.[11]

Colonial Assemblies in 1939.—The establishment of local representative assemblies or councils in the overseas territories is not, in itself, in contradiction to the policy of *assimilation,* since councils of a comparable kind exist in the districts and regions of the métropole. "Toutefois, comme un territoire d'outre-mer est un centre d'intérêts, plus distinct qu'un département métropolitain et comme tous les services y dépendent, en principe, de l'autorité locale, une décentralisation même imitée de celle qui existe dans la métropole peut aboutir à conférer à l'assemblée locale un rôle sensiblement plus étendu."[12] Colonial assemblies came and went throughout the nineteenth century, their powers usually being greater when *assimilation* was not in the ascendant. In the three "old colonies" a *conseil général* was established which came more and more closely to resemble in composition and powers those of France itself. In the other older territories—Guiana, French India, New Caledonia, and for a time certain other territories, more or less similar *conseils généraux* were established. But after the First World War,

[10] The text of the Sénatus-Consulte of May 3, 1854, is in *Bibliothèque Coloniale Internationale, 8ème Série, Tome II.* Brussels, 1906, pp. 137-144.

[11] For the statutes applicable *de plein droit* v. Lampué, P., *Les lois applicables dans les territoires d'outre-mer,* in Recueil Penant, Tome 54, II, pp. 1-10, and for the rules about promulgation and publication v. Rolland et Lampué, *op. cit.,* pp. 195-200.

[12] Rolland et Lampué, *op. cit.,* p. 464.

the tendency was to establish assemblies or councils with more restricted powers, and composed in varying ways considered more appropriate to the special conditions of the territories. In 1920, for example, the *conseil général* of the older parts of Senegal was replaced by a *conseil colonial* for the colony as a whole, including members elected by different categories of elector, voting separately. Similarly, the *délégations* established in Madagascar (1924) and Oceania (1932) were composed not only of members elected, directly or indirectly by such groups, but also some nominated by the Chambers of Agriculture or Commerce. The same pattern could be seen in Tunisia, where in 1922 a *grand conseil* replaced an earlier consultative conference. It had two sections, French and Tunisian, each composed in the manner of the *délégations*. In Morocco, a *conseil du gouvernement* existed, composed of two sections, French and native, the first made up of the Chambers of Agriculture and Commerce, together with some elected by French citizens who did not belong to the Chambers, the second consisting entirely of Moroccan members of those Chambers. Elsewhere, in French West and Equatorial Africa, a few elected members might be added to the Governor's advisory council, but their powers remained wholly advisory. Local assemblies, however composed, were on the whole thought of as reaching their extreme limit of power in attaining the position of a departmental *conseil général* in France.[13] Essentially they vote the departmental budget (but parts of it are obligatory) and deal with a number of minor executive matters. In all four of the topics selected, the same pattern can be made out, corresponding largely with the historical aggregation of the Empire: an underlying assimilationist theory alongside divergencies from the ideal of identification between metropolitan and overseas territory which that implies, which tend to increase as the territory considered becomes one more recently acquired. It is this pattern of an underlying assimilationist theory contrasting with a reality too often made up of a small indigenous *élite* itself largely subordinated to the predominantly metropolitan *citoyen*, and a large indigenous mass which remained substantially in the cadres of its own culture, economy, and law which has been so much criticized since the war as *colonialisme*. Some features of the pattern are inevitable in present circumstances in any of the underdeveloped territories of the world, but the very strength and tenacity of the assimilationist theory in French thought on this subject both increased resentment when it was not immediately realized and accelerated the pace of that erosion of the indigenous social structure which any contact between Western civilization and preliterate and subsistence societies must initiate.

II. Colonial Policy During the War.—French thought about the colonies is often said to have been profoundly changed during the war: and it is true that, during the early years of the war, the closer association between Equatorial Africa under Eboué and the British in Nigeria led to a better understanding of the aims and methods of "indirect rule," evidence of which can be seen in the circulars on Native Policy which Eboué issued[14] and even in the discussions of the Conference of African Governors which opened at Brazzaville on January 30, 1944. But this did not really represent a permanent change of policy and the influence of the war was rather in changing the balance of power of different groups, and, by consequence, different conceptions of the main features of colonial policy, than in creating fundamentally new ideas. Three events during the war help to explain tendencies which eventually shaped the new Constitution; the Brazzaville Conference; the ordonnance of March 7, 1944, conferring citizenship on certain categories of Muslims in Algeria; and the Colonial Minister's pronouncement of March 24, 1945, on the future status of Indo-China.

The Brazzaville Conference was essentially (and inevitably) a conference of colonial administrators, under the presidency of the "Commissioner for the

[13] For a short account of the powers of these bodies, see Barthélemy, *Le gouvernement de la France*, nouvelle edition. Paris, 1939, p. 161.

[14] v. Eboué, F., *Politique indigène de l'Afrique Equatoriale Française*. Brazzaville, 1941.

Colonies" of the Algiers Government. In addition to the Governors of the African colonies and their principal assistants, there were present a delegation from the Provisional Assembly, and, as observers, representatives of the French authorities in Algeria, Tunisia and Morocco. It combined an underlying remnant of assimilationist theory—and especially the firm conviction that France and her overseas territories must remain united—with marked hostility to the excessive centralization of the pre-war system. Its principal conclusions in the constitutional sphere have been admirably summarized by M. Pleven who presided over it: "The experience of all French Governors during the war had been that overseas territories found themselves the better for being freed from a certain form of narrow petty tutorship exercised in peace-time by the Ministry of Colonies, and that a large measure of administrative freedom was required in the interest of the Colonial peoples and territories. They were also all convinced that the time had come when the people overseas should be associated with the government and administration of their territories. The recommendations made . . . were very clear. First, the Colonial territories should be represented in the Constituent Assembly which would be called to draft the new French Constitution. Second, the participation of the colonial territories in the political representation in France should be much larger and more powerful than in the past. Thirdly, the Conference did not think the proper way to attain this aim was by increasing the number of seats reserved to French overseas territories in the French Chamber of Deputies. Fourthly, the Conference felt that a new body was necessary, either a Colonial Parliament, or preferably a Federal Parliament, but on the condition that the powers given to local authorities or assemblies, and those reserved to the Federal Authority should be very clearly defined. Fifth, as regards the organization of the overseas territories the Conference was in favour of creating everywhere local assemblies composed partly of Europeans and Natives, elected as far as possible, but representative, when election was difficult, of the traditional *élite*. Sixthly, the Conference wanted a system allowing a large degree of administrative decentralization and growing political decentralization, permitting technical and economic planning, but excluding political independence."[15] Under the influence of Eboué and his associates, the Conference further urged the maintenance of traditional institutions, not as an end in itself, but as the means most likely to promote vigorous local and regional activity. But at the same time it reasserted the assimilationist dogma in educational policy: all teaching must be in French, any pedagogic use of "local dialects" (this way of describing African languages is significant) being absolutely prohibited. The Conference recommended the abolition, at the end of the war, of the *indigénat* and the suppression, over a period of five years, of forced labour, but added that a compulsory labour service should be established for Africa for those men between 20 and 25 years of age who were not taken for military service, a remedy as bad as the disease.

The Brazzaville Conference, which represented essentially the point of view of colonial administrators, and then only of those concerned with African territories, was, on the whole, for the maintenance of assimilation as the *goal* of policy as far as individual rights and status were concerned, though it made some concessions to the actual situation, in the direction of greater recognition of traditional society, but—as might be expected of colonial administrators—it was very definitely against assimilation in the sense of administrative centralization, and wished to see the establishment of substantial administrative freedom in individual territories combined with the maintenance of political unity by some kind of federal constitution. In the event, the Constitution of October, 1946, was to go further than the Conference in the direction of assimilation of the

[15] Pleven, R., *The Political Transformation of the French Empire*, in the Colonial Review, Vol. VI, p. 116. The French text of the Conference recommendations thus summarized is in *La Conférence Africaine Française, Brazzaville* 30 *Janvier*-8 *Février*, 1944. Paris, 1945, pp. 32-35.

political rights and status of individuals but much less far in the direction of limited autonomy within a federal organization.

The next significant event of the war years was the enactment of the ordonnance of March 7, 1944.[16] This conferred on the Muslims of Algeria all the rights and all the duties of non-Muslim Frenchmen, no matter what their *statut personnel,* though not all were to exercise their electoral rights in the same way. *Notables,* civil servants, ex-members or members of the various councils, veterans, trade unionists and *conseillers prud'hommes* were to vote in the same *collège* as the French citizens of *statut français.* The remaining Muslims would vote in a second *collège* including all male Muslims over 21 years of age. This second *collège,* though numbering about three times the membership of the first, returned only two-fifths of the members of the representative bodies. But the essential importance of this legislation lay in the extension to persons not subject to the *Code Civil* and indeed most unlikely ever to renounce their *statut personnel* of the rights and duties of citizenship, though the word citizen was not used. "L'importance de cette réforme ne réside pas tant dans l'octroi d'un bulletin de vote que dans le fait que désormais tous les musulmans possèdent les mêmes droits et les mêmes libertés que les Français et sont soumis aux mêmes devoirs."[17] This was the first step towards the generalization of the arrangement, hitherto peculiar to the four *communes* in Senegal, whereby citizenship could be divorced from *statut français.*

Finally, on March 24, 1945, the Colonial Minister, M. Giacobbi, made a considered statement about French intentions in Indo-China. He said: "La Fédération indochinoise formera avec la France et les autres parties de la Communauté, une Union française dont les intérêts à l'extérieur seront représentés par la France.

"Les ressortissants de la Fédération indochinoise seront citoyens indochinois et citoyens de l'Union française sans discrimination de race, religion, et à égalité de mérites. Ils auront accès à tous les postes et à tous les emplois fédéraux en Indochine et dans l'Union."[18] This declaration was made after the internment of the French authorities in Indo-China on March 9 and the proclamation of the "independence" of the territory by the Japanese, and was no doubt influenced by the need to counter this stroke by giving an earnest of French intentions. But it is important on two counts: the first use of the expression "French Union" in an official document; and the promise of a new citizenship, citizenship of the French Union, the nature of which is not defined but which is expressly stated to be compatible with a local citizenship of Indo-China, on which it is superimposed.

These various war-time moves had, then, produced a number of ideas about the future political structure of the French Empire which may be summarized thus:—

(i) the idea, however general, that Metropolitan France and the colonial territories should be regarded as a community, a federation, or more likely a union, in which some at least of those territories might enjoy a considerably larger autonomy.

(ii) the idea that the colonial territories should enjoy much more influence in the conduct of affairs of common interest to this "French Union" and that this must involve radical changes in the pre-war arrangements for the metropolitan representation of the overseas territories.

(iii) the conception of an increased rôle for local representative assemblies in the colonial territories themselves and concerned with their own local affairs.

[16] Text reproduced in full in Gouilly, A., *L'Islam devant le monde moderne.* Paris, 1945, p. 204.

[17] Amar Ouzegane, in *Liberté,* 16.iii.44, cited in Devèze, *op. cit.,* p. 191. For a criticism of the policy of this ordnance, v. Lavergne, *op. cit.,* pp. 127-140.

[18] Text quoted in Devèze, *op. cit.,* p. 210.

(iv) the realization that citizenship, in the sense especially of accession to public rights, duties, and equality of status with the Metropolitan French, must be much more widely extended and could not be restricted to those of *statut français*.

(v) a general sense of the need for a "new order," a "modernization" of the empire, the end of "colonialism" regarded as a system of inequalities and indignities like forced labour and the *indigénat*.

All these notions owed something to the past: none represented a complete break with the ideas of the Third Republic. All were rather "notions" or even "tendencies" than clear-cut ideas, and, as we shall see, neither the constitutional debates of 1945 and 1946 nor the Constitution itself did much to clear them up.

III. The Constitutional Debates.—The electoral laws of De Gaulle's Provisional Government[19] "gave the suffrage not only to all French citizens in the Empire, but also to limited categories of non-citizen natives. Because the latter usually outnumbered the citizen colonists, even when restricted to a few categories, the law divided the voters into two separate colleges throughout 'Black Africa,' Madagascar, and Algeria. In the older colonies where citizenship was almost universal, all voters were lumped into single colleges; while in the protectorates of Morocco and Tunisia, French citizens alone could vote."[20] The total of 64 seats for overseas representatives included 36 elected by citizens, 24 elected by non-citizens, and three elected jointly, i.e. by what we should call a common roll. Of these, 26 came from Algeria, and five more were elected by French citizens in Morocco and Tunisia. None at all came from Indo-China, so that the strictly "colonial" representation was a good deal smaller than might appear at first sight. Nevertheless, even if this representation was not quite so revolutionary as has been claimed,[21] it was a considerable change from the pre-war position. It would be out of place in an article of this kind to attempt any detailed account or analysis of the debates of the two Constituent Assemblies and their Constitutional and Overseas Committees[22] though, perhaps because of their very confusion their study is illuminating, throwing into perspective the cross-currents of French ideas about colonies, and going far to explain the contradictions of the present Constitution. The fundamental issue was the old division between assimilation and autonomy, though it had been changed, as a result, in part at least, of wartime discussions, into a conflict between the federal and the unitary thesis. In the First Constitution of April 19, 1946, it was claimed that a compromise had been achieved but "en réalité, la rencontre des tendances avait abouti . . . tantôt à la contradiction et tantôt à l'incertitude."[23] On the whole, however, it was the unitary and assimilationist thesis which was uppermost. The "overseas territories" were to elect deputies to the National Assembly (Art. 48); French laws, unless expressly declared inapplicable, were to apply not only to the new overseas departments (created by the law of March 19 and consisting of the "old colonies" of Martinique, Guadeloupe, French Guiana and Réunion) but also to the overseas territories (the remaining colonies) (Art. 66) while it was firmly declared (Art. 114) that "La République française, une et indivisible, reconnaît l'existence de collectivités territoriales" which were "les communes, les départements, les territoires et fédérations d'outre-mer." On the other hand, it was

[19] Ordonnances of August 21, September 13 and September 21, 1945.

[20] Wright, G., *The Reshaping of French Democracy*. London, 1950, p. 97.

[21] Cf. Devèze, *op. cit.*, p. 220, "les pays d'outre-Mer allaient participer d'une façon active à l'élaboration des lois et de la Constitution de l'Union française. Des non-citoyens de statut musulman, hova ou sénégalais, allaient même délibérer des lois purement métropolitaines et voter des modifications au statut civil français."

[22] Good accounts will be found in Devèze, *op. cit.*, pp. 221-281; Boisdon, *op. cit.*, pp. 19-55; and Wright, *op. cit.*, especially pp. 142-150, 201-205 and 213-222.

[23] Lampué, P., *L'Union Française d'après la Constitution*, in Revue Juridique et Politique de l'Union Française, Tome I, p. 11. My indebtedness to this outstanding work will be obvious to all who know it.

declared (Art. 41) that "La France forme avec les territoires d'outre-mer, d'une part, et avec les Etats associés, d'autre part, une union librement consentie," which at least paid lip-service to the federal idea, while in Art. 71 a Council of the French Union was established, which was to have the purely advisory function of giving its opinion to the National Assembly on proposals for legislation or bills. It was to be composed of members elected by the *conseils généraux* or the territorial assemblies of French and overseas departments and overseas territories. This Council was in fact the outcome of an uneasy compromise between the protagonists of bicameralism, the proponents of a federal assembly for the French Union as a whole, and the bitter opponents of any revival of the pre-war Senate. It was essentially an organ of a Unitary State, and contained no provision for any representation from the associated states.[24] As for citizenship, the Constitution of April, 1946 (Art. 44), proclaimed that "tous les nationaux et ressortissants français de la métropole et des territoires d'outre-mer jouissent des droits de citoyen." No attempt was made to define this citizenship, to settle whether it was French citizenship or a new status of citizenship of the French Union. "L'incertitude, ici, était voulue ou, du moins, acceptée."[25] Although the Assembly voted on May 7, 1946, a separate law, usually referred to after its author, the Sengalese deputy, as the *Loi Lamine Gueye,* to confer citizenship immediately on all colonials, it, too, left undefined the nature of this citizenship. But even if the citizenship thus conferred was citizenship of the French Union, it at any rate secured to the erstwhile *sujets français* the rights conferred by the Declaration of Rights, which was the major feature, so far as they were concerned, of the Constitution.

Finally, this abortive Constitution (Art. 119) declared that local representative assemblies were to be established in the overseas territories. The major division on this subject was whether they were to be elected on the common roll or by the system of the two colleges which had been established in Algeria by the ordonnance of March 7.[26] The spokesmen of the Right urged the separate college for citizens of *statut local* (i.e. the Muslims of Algeria and the Africans who retained their own law). This "second class citizenship" was warmly repudiated by the Left and the Constitution remained silent on this point too. A law of April 13 established the *collège unique* for all the overseas territories, while another of the same day maintained the two colleges in Algeria. These laws, however, never came into force in view of the rejection of the Constitution. Although this first constitution was rejected by the métropole, the majority of the oversea electorate voted for it but "without exception, wherever white colonist voters were in the majority the constitution was rejected; wherever native voters dominated it was approved. The key to these results was the fact that citizens alone were allowed to vote. Throughout North Africa, Black Africa, and Madagascar, citizenship was restricted almost entirely to the white colonists. They balked at the prospect of new political and social guarantees for the natives, at the threat that the white minority would be swamped by a flood of new citizens, and at the idea of relaxing the bonds of empire. Only in territories where the natives had long since been promoted from subject to citizen (Senegal, French India, and the four "old colonies") was the constitution approved by huge and triumphant majorities. These results suggested that the French Union problem had merely been skirted by the first Constituent Assembly."[27] If the abortive April Constitution had been welcomed by the colonial peoples, largely on account of its extension of the enlarged Rights of Man to them all, this very feature had provoked alarm among the *colons,* Frenchmen established in the overseas territories, who proceeded to set up a "States-General of French *Colonisation,*" which denounced assimilation and demanded a distinction between

[24] Cf. Lampué, *op. cit.*, pp. 13-14.
[25] v. Lampué, *op. cit.*, p. 13.
[26] *Vide supra,* p. 8.
[27] Wright, *op. cit.*, p. 180.

French citizenship and citizenship of the Union (the so-called "second-class" citizenship) and the establishment of a Federal Assembly in which France and the colonial territories would be represented. This in turn was countered by the formation of an Overseas Parliamentarians Group, which put forward the most extreme secessionist proposals, the renunciation of French claims to sovereignty over colonial peoples and a period of 20 years within which each colonial territory might choose secession, federation, or integration. They further suggested postponing the drafting of a Constitution for the Union to a third Constituent, with overseas representation on a population basis. The Constitutional Committee of the Second Constituent, which was very divided, came to a deadlock on the proposal to postpone drafting a Constitution for the Union, and it was only the gradual move of the Socialists towards the Right and towards some kind of federal system, combined with the abandonment by the Government of the principle of non-intervention observed up to then in the constitutional debates, and their submission of a Government draft, which made possible the inclusion of the present Section VIII in the Constitution of October 27. The debates of the two Constituents and their various Committees represented, in spite of their confusion, the furthermost extent of the anti-colonial reaction after the war, and soon after the new Constitution came into operation, there began the gradual Rightwards trend which was to remain characteristic of French politics for some years. The debate was not resolved; the Constitution represented a mixture of policies and ideas, though its substantial provisions were fairly heavily tilted in an assimilationist direction, concessions to federalism and autonomy being more apparent than real.

IV. The Constitution of October 27, 1946.—Consideration of the present Constitution may begin with an examination of the general doctrine which it expresses on the subject of the French Union and the structure of institutions it establishes to express that doctrine. Thereafter, it will be convenient to examine the four topics which served as the basis of our consideration of the pre-war French Empire, as they are dealt with in the new Constitution,[28] to examine separately the special position of Algeria, and to consider the law establishing a "Fonds d'Investissement pour le développement économique et sociale des territoires d'outre-mer," which is an important part of post-war settlement.

The Preamble states that: "La France forme, avec les peuples d'Outre-Mer, une union fondée sur l'égalité des droits et des devoirs, sans distinction de race ni de religion.

"L'Union française est composée de nations et de peuples qui mettent en commun leurs efforts ou coordonnent leurs ressources et leurs efforts pour développer leurs civilisations respectives, accroître leur bien-être, et assurer leur sécurité.

"Fidèle à sa mission traditionnelle, la France entend conduire les peuples dont elle a pris la charge à la liberté de s'administrer eux-mêmes et de gérer démocratiquement leurs propres affaires, écartant tout système de colonisation fondé sur l'arbitraire; elle garantit à tous l'égal accès aux fonctions publiques et l'exercice individuel ou collectif des droits et libertés proclamés et confirmés ci-dessus."

The essentially assimilationist notion of the identity of rights, the guarantees of equal access to public office and of individual and collective exercise of the rights stated or confirmed earlier in the Preamble is thus combined with the federal conception of an association of communities (some of which are "nations" and some not) in the "French Union." But at the same time that this suggests that the colonies are elements which, together with Metropolitan France and other "nations" (e.g. Morocco) make up this "Union," we are also told that "France," i.e. Metropolitan France, intends to lead the peoples for whom she has accepted responsibility towards freedom of administering themselves and managing their

[28] For the text of the Constitution v. Malézieux, R. et Rousseau J., *La Constitution de la IVe République*. Paris, 1949. The authorized English translation is in Wright, *op. cit.*, p. 269 *et seq.*, but inexplicably about half the Preamble is omitted. Culman, H., *L'Union Française*, Paris, 1950, pp. 106-111, has a most useful table of the laws, decrees, etc.

own affairs on a democratic basis, which implies that this position has not yet been realized. Indeed, this part of the Preamble, with its echoes of other statements on colonial policy "définit un programme plutôt qu'il ne décrit la structure présente de l'Union."[29] The actual situation, on the other hand, is laid down in Article 60 of the Constitution which defines the components of the French Union as, on the one hand, the French Republic "qui comprend la France métropolitaine, les départements et territoires d'outre-mer" and on the other hand associated territories and states. This is closer to the assimilationist tradition, since the "overseas territories" are in fact the colonies, other than the "old colonies" which, as we have already seen, had been declared "overseas departments" by the law of March 19, 1946.[30] They are all fragments of the French Republic and it is this French Republic, as one unit which, together with other units, the "associated territories" and "associated states" makes up the French Union. These other units are those parts of the old Empire which enjoyed a distinct international status, namely, the former mandated territories now administered by France under the international Trusteeship system (Togoland and the Cameroons) which are the "associated territories," and the Protectorates of Morocco, Tunisia, and Indo-China. And if this is the actual situation, while the Preamble represents the future programme, there should be a provision whereby we can move from one position to another, as indeed there is, in Article 75, badly drafted as it is. This article provides for what the French call "mutability of status." "The respective statutes of the members (membres) of the Republic and of the French Union," it says, "are liable to evolve." Amendments of statute and the passage from one category to another within the framework set forth in Article 60, can only be brought about by a law voted by Parliament, following consultation of the territorial assemblies and the Assembly of the Union." Although the expression "member" is inappropriate in relation to the Republic, which is a unitary state, there is general agreement that this means an overseas territory, and possibly, though not so definitely, an overseas department.[31] The Constitution in fact conceives the status of an overseas territory as "un statut d'attente, et non pas un statut cristallisé,"[32] which may, so to speak, move either to the logical outcome of assimilation, i.e. the status of a department, or to the logical outcome of autonomy (within the French union), i.e. the status of an associated state. Meanwhile, instead of being placed in a special group of their own within the Union they are, quite realistically, treated as parts of the Republic.

The position of the associated states, on the other hand, is quite different. They are not parts of France but territories brought into a defined relationship with it by virtue of international treaties. These treaties determine their position in the French Union (Art. 62), "Ils étaient d'après ces traités, des parties de l'Empire; l'Union ayant succédé à l'Empire, ils sont nécessairement des éléments de celle-ci."[33] But although no new act is required to bring them within the Union to this extent, they cannot be obliged to take part in the new institutions established by the Constitution merely by virtue of its enactment by the Republic, since these institutions were not foreseen at the time when the existing treaties

[29] Lampué, *op. cit.*, p. 18, cf. Luchaire, *op. cit.*, pp. 92-93.

[30] *Vide supra*, p. 11.

[31] Rolland et Lampué, *op. cit.*, p. 79, seems to take the view that both territories and departments are "members of the Republic," while Luchaire, *op. cit.*, p. 96, maintains that "en principe, les départements d'outre-mer n'ont pas de statut," though exceptionally (as in the case of Algeria) they may receive one. v. also Charlier, R-E., *La Mutabilité des statuts coloniaux dans l'Union Française*. Recueil Penant, Tome 52, I, pp. 41-51. Action under this Article of the Constitution has already been taken in the law of June 4, 1949, which changed the status of Cochin China from that of overseas territory to that of being part of an associated state. v. Lacharrière, R. de, *Le changement de statut de la Cochinchine*, in Revue Juridique et Politique de l'Union Française, Tome III, pp. 146-173.

[32] Lampué, *op. cit.*, p. 25.

[33] Lampué, *op. cit.*, p. 27. This view of the position of Tunisia and Morocco has been confirmed by the *avis* of the *Comité Juridique de l'Union Française* of February 4, 1948.

vere signed. Hence specific agreement on their part is required for their partici-ɔation in either the High Council or the Assembly of the French Union, two new ɔodies established by Articles 65-68 of the Constitution. They do not, of course, lect representatives to the purely French Parliament, the National Assembly and he Council of the Republic. The functions of the President of the Republic as President of the Union (Art. 64), the participation of all members of the Union n common defence measures (Art. 63), and the admission of persons belonging o an Associated State to "citizenship of the French Union"[34] (Art. 81), can all ɔe regarded as at least implicit in the existing treaties regulating the position of he Associated States.

The French Union, then, is a Union of the French Republic, the Associated States and the Associated Territories, while the Republic itself includes besides Metropolitan France, overseas departments and overseas territories. It is recog-nized that areas may change from one category to another, all persons belonging o any part of the French Union enjoy citizenship of the Union, and there are nstitutions at the centre which either do or may include representatives from ıll parts of the Union.

Citizenship since 1946.—The provisions of the Constitution relating to citizen-ship are no exception to the generally rather slap-dash draftsmanship of the parts elating to the French Union. Article 80 declares that "tous les ressortissants des erritoires d'outre-mer ont la qualité de citoyen, au même titre que les nationaux rançais de la métropole ou des territoires d'outre-mer. Des lois particulières établiront les conditions dans lesquelles ils exerceront leurs droits de citoyens." The term *nationaux français* is ill-conceived since, from the point of view of nternational law *les ressortissants des territoires français* are French nationals: what is meant is *citoyens de statut français*, i.e. the non-citizens of the colonies will in future have the status of French citizens just as much as *citoyens de statut français*, though the content of this citizenship is to be regulated by separate laws. The draftsmen also overlooked the fact that there were non-citizens in Algeria, though this was not an overseas territory, and it was clearly the intention that Article 80 should apply to them also.[35] Article 82 makes it clear that the new citizens do not automatically lose their *statut personnel* and further provides that their possession of such a *statut* may not in any circumstances constitute a ground on which their rights and liberties as French citizens may be denied or reduced. There is thus a *prima facie* conflict between Article 82 and the provision of Article 80, according to which special laws will determine the circumstances in which the citizens of overseas territories are to exercise their rights, but the general view is that the rights and liberties of Article 82 are those referred to in the Preamble, as opposed to the electoral rights which fall to be determined by separate laws. So far as individual liberty and public rights were concerned, much had already been done to assimilate the position of the non-citizens of overseas territories to that of citizens. Forced labour was abolished,[36] metropoli-tan legislation regarding freedom of meeting and association extended to all overseas territories,[37] and the *indigénat* abolished in so far as penal law was concerned, and the French criminal courts alone empowered to deal with penal cases.[38] It is not easy to exaggerate the importance of this extension of citizen-ship, with its political rights to all "natives"; and although, as has been shown, the idea that citizenship in that sense could be separated from citizenship in the sense of the possession of *statut français* was not absolutely unknown in the pre-war Empire, its generalization was perhaps the most fundamentally revolutionary

[34] v. *infra.*, p. 18.

[35] This has since been made explicit in the law of September 20, 1947, and was evident from the discussions in the Second Constituent.

[36] Law of April 11, 1946.

[37] Decrees of April 11 and March 13, 1946, respectively.

[38] Decree of April 30, 1946. On all this, v. Chatelain, J., *L'Evolution du statut des populations d'outre-mer en droit public* in Revue Juridique et Politique de l'Union Fran-çaise, Tome I, p. 83 *et seq.*

aspect of the Constitution as it affected the overseas territories.[39] All French nationals in France, the overseas departments and the overseas territories are therefore French citizens, equally guaranteed the rights and freedoms set forth in the Preamble, though some possess *statut français* and some retain *statut local*, and the electoral rights of citizens are not everywhere the same. What the electoral rights of citizens of overseas territories are, will be considered in connection with representation at the centre and local representative assemblies.

But besides this modification and extension of French citizenship, the Constitution also creates (Art. 81) a new citizenship, citizenship of the French Union, conferred on "tous les nationaux français et les ressortissants de l'Union française," i.e. on all French citizens and on persons belonging to the parts of the Union, other than the French Republic, viz. associated territories and associated states. Thus all citizens of the French Union are also French citizens, or citizens of an Associated State, or are *administrés français* of one or other of the two Trust Territories. But what is this "citizenship of the Union"? There is general agreement that it also involves the rights and liberties of the Preamble, and so far as the *administrés français* of the two Trust Territories are concerned, no difficulty arises, since the French legislator has full powers in these territories and can confer on people belonging to them all these rights both in their own territories and in other parts of the Union. But as regards the Associated States, the best view seems to be that in the absence of any new act, replacing existing treaties between France and the Associated State in question, the rights and liberties of the Preamble can only be conferred on persons belonging to the Associated States when such persons are in French territory, i.e. the French legislator cannot legislate for the Associated States unless expressly so empowered by the "act of association."[40] Citizenship of the French Union, in sum, is not at present of very much practical significance: it is an affirmation of "les liens unissant tous les ressortissants de l'Union Française."[41]

Representation at the Centre since 1946.—We have seen that before the war Algeria, the "old colonies," and various other older colonies were represented in the Metropolitan Parliament and that the Brazzaville Conference, emphatic that central representation of colonial interests was vital, was equally emphatic that the resuscitation and even extension of this representation was not the right means of ensuring such representation. But the Brazzaville Conference had recommended the inclusion of substantial overseas representation in the Constituent Assembly, perhaps overlooking the obvious fact that, once such representation had reinforced the pre-war arrangements, the overseas members of the Constituent would be most unlikely to agree to its disappearance. The parties of the Left were, on the whole, assimilationist in outlook (though inclined to permit secession) and were equally unwilling to agree to the abolition of Parliamentary representation of the overseas territories—which in any case was likely to be predominantly Left in sympathy. For these reasons, overseas territories (and, *a fortiori*, overseas departments) are represented in both the National Assembly and the Council of the Republic. This is, moreover, a logical outcome of the view that the Republic, over which Parliament rules, includes not only the overseas departments but also the overseas territories, and if it is less logical

[39] A recent attempt by the administration in French Equatorial Africa to compel *citoyens de statut local*, i.e. the former non-citizens, to carry identity cards was invalidated on the ground of incompatibility with Article 82 of the Constitution. v. Recueil Penant, Tome 53, I, pp. 271-8.

[40] v. Lampué, *op. cit.*, p. 161. As Luchaire, *op. cit.*, p. 153, points out, this follows logically from the view that the existing international treaties in respect of Morocco and Tunisia are sufficient in themselves to bring those countries within the Union. He argues, on the contrary, that the adherence of an Associated State to the Union requires a positive act, which in itself involves the acceptance of the Preamble. This view, however, seems to be ruled out by the *avis* of the *Comité Juridique de l'Union Française* of February 4, 1948, cited note (33).

[41] Luchaire, *op. cit.*, p. 153.

vhen such representation is extended even to the associated territories, the prac-ical sense is clear since, although these latter are subject to a special international egime, their actual position is virtually identical with that of the overseas terri-ories. The present overseas representation is 76 members in the National Assembly, 40 elected by the overseas departments including Algeria, 32 by the overseas territories and four by the two associated territories. Similarly, in the Council of the Republic the total overseas representation is 65, of whom 21 are rom the overseas departments, 39 from the overseas territories and five from the ssociated territories. The electorate for the National Assembly is composed of ll citizens of *statut français* and those citizens of *statut local* on whom electoral ights were conferred by the law of October 5, 1946. In addition to those who ad previously possessed electoral rights, this law conferred such rights on certain ategories of citizens of *statut local,* e.g. civil servants, employees of certain nterprises, ministers of religion, traders, planters, members of local councils, o-operatives, trade unions, service-men, ex-service-men, holders of certain lecorations, literates either in French or Arabic, and even holders of shooting nd driving licences. "On a marqué la volonté de tendre à l'universalité du uffrage en introduisant dans les collèges . . . toutes celles qu'il est facile d'indi-idualiser en vue du scrutin . . . cela fait apparaître l'idée que seule l'insuffisance le l'organisation de l'état civil empêche actuellement de reconnaître à tous le droit de vote."[42] For elections to the National Assembly the *collège unique* s established in all territories except Madagascar, French Equatorial Africa and he Cameroons. The electorate for the Council of the Republic is in each terri-ory the members of the territorial assembly (in Madagascar the provincial Assem-blies), together with the deputies. For these elections, however, the electors form wo *collèges,* not only in Equatorial Africa, Madagascar and the Cameroons, but lso in French West Africa and Togoland.

In addition to this representation in the French Parliament, the Constitution reated also institutions for the French Union, a President, a High Council and n Assembly. The President of the French Republic, although elected by the French Parliament in which the associated states are not represented, is never-heless *ex-officio* President of the Union. The President, however, apart from residing at the meetings of the High Council, has only rather sketchy functions vhich can be argued to be implicit in existing treaties relating to Morocco and Tunisia. The High Council is to be composed of a delegation of the French Government and the representatives which each associated state has power to ccredit to the President of the Union. Its function is to assist "the government" i.e. the French Government responsible only to the French Parliament) in the eneral management of the Union. Little more can be said of this body (which as not yet [September, 1950] met) except that by the law of April 24, 1949,[43] he French delegation is composed of the *Président du Conseil* and the Ministers f Foreign Affairs, Interior, Armed Forces, Finance and Overseas France *ex fficio,* together with such other members as may be appointed for each meeting, vhile the representation of each associated state will be settled by agreements etween France and the state concerned "dans le cadre des actes qui définissent eurs rapports avec la France."

The Assembly of the French Union, on the other hand, has come into exis-ence, if not into life. "Ne voulant pas créer une Assemblée Fédérale supérieure u Parliament métropolitain, la Constitution a donné le jour à un organe ayant aspect, mais non les pouvoirs d'un Parlement."[44] In its composition, but in o other respect, the Assembly reflects the federal preoccupations of some of its

[42] Rolland et Lampué, *op. cit.,* p. 268.

[43] Text in Revue Juridique et Politique de l'Union Française, Tome III, p. 25. v. also acharrière, R. de, *La Fonction du Haut Conseil de l'Union Française, ibid.,* pp. 1-24.

[44] Luchaire, *op. cit.,* p. 121.

creators. Half of its members must be representative of Metropolitan France.[45] The *conseils généraux* of the four new overseas departments each elect one member while those of the three Algerian departments each elect four and the Algerian Assembly[46] six. Each overseas territory, even Saint-Pierre and Miquelon, has at least one member, and altogether they have forty-seven elected by the territorial assemblies, except in Madagascar, where the assemblies of each province also elect members. Although the Constitution does not provide for the representation in the Assembly of the Union of the two associated territories, such provision was specifically made in the law of October 27, 1946, Togoland having one and the Cameroons six. Finally, the associated states may appoint members as provided by a law and an internal act of the state itself. The law of October 27, 1946 in effect restricts the number of representatives of the associated states to a maximum of forty-five, since it restricts to that number the additional members who may be elected to represent Metropolitan France in order to maintain parity of metropolitan and overseas representation. By the decrees of July 19, 1948 the new associated states of Cambodia and Laos appoint five and three members respectively, while by that of January 10, 1950 Viet-Nam appoints nineteen.

But if there is thus a recollection of the federal idea in the composition of the Assembly of the Union, its functions, so far from being those of a federal legislature, are purely advisory and practically confined to the overseas territories. It may, of course, be consulted by the National Assembly, the French Government, or even the Governments of the associated states, and it must be consulted as regards the *statut* and internal organization of each overseas territory, or group of territories, amendments of *statut* and changes from one category of overseas area to another, the enactment by decree[47] of provisions peculiar to each overseas territory, and the application by decree to overseas territories of any laws not specifically so applied by the National Assembly itself. The Assembly may also pass resolutions for transmission to the National Assembly providing they relate to the legislation concerning overseas territories and may make proposals to the French Government and the High Council of the Union. Although, therefore, the Assembly must be consulted about changes of category which in practice are almost certain to be the "promotion," so to speak, of an overseas territory to the position either of a department or an associated state, though they might, theoretically, include changing the *statut* of overseas departments or associated states, all the other matters on which it must be consulted concern only the overseas territories, as do the only matters on which it may directly address the National Assembly. The Assembly of the Union has not submitted tamely to these various limitations on its in any case very restricted powers, but it has not yet wrested any major concession from the Government[48] The *Régime Législatif"* since 1946.[49]

Associated States.—In general, it may be said that the *régime législatif* of the associated states is not affected by the Constitution. It remains regulated by the agreements which bring the state concerned within the Union. "Les lois de chaque pays émanent, en effet, de ses propres organes, et elles doivent seulement recevoir, lorsque le traité de protectorat ou d'association le prescrit, le visa du représentant du gouvernement français. L'obligation du visa est établie par les

[45] Two-thirds of the metropolitan members are elected by the National Assembly and one-third by the Council of the Republic (Art. 67) and, by the laws of October 27, 1946 and August 27, 1947, only the metropolitan members of these two bodies take part in these elections.

[46] v. *infra*, p. 28. The population of Algeria is approximately ten times that of the overseas departments.

[47] *édiction* in Article 72 of the Constitution.

[48] A short account of its first session is in *Assemblée de l'Union Française: L'oeuvre de sa première session. Rapport*, by G. Boussenot. Paris, n.d.

[49] On this v. Lampué, *op. cit.*, pp. 162-194; Lagrange, M., *Le Nouveau Régime Législatif de la France d'outre-mer*. Paris, 1948; Charlier, R-E, *Comment on légifère pour les territoires d'outre-mer*, in Recueil Penant, Tome 53, II, pp. 91-114.

traités de protectorat passés avec la Tunisie et le Maroc. Dans le texte des *modus vivendi* concernant le Cambodge et le Laos, il est également prévu que le commissaire de la République donne son 'attache' aux actes législatifs et réglementaires."[50]

Overseas Departments.[51]—The four "old colonies" of Martinique, Guadeloupe, Guiana and Réunion were transformed into overseas departments by the law of March 19, 1946, and such provisions of this law as do not conflict with the Constitution remain in operation. This law provided that past laws applicable to France itself should be applied to the new departments by decrees before January 1, 1947, though the period was subsequently prolonged to March 31, 1948. It was intended to enable the Government, in extending to the new departments laws never intended to apply to them, to make such modifications as local conditions might require. Nothing in the Constitution ran counter to this provision, which accordingly remained in force. On the other hand, the law of March 19, 1946 had provided that new laws applicable to France should not apply to the new departments without express provision, while Article 73 of the Constitution provides, on the contrary, that "le régime législatif des départements d'outre-mer est le même que celui des départements métropolitains, sauf les exceptions déterminées par la loi," i.e., for the future (after December 24, 1946, when the Constitution came into operation), French laws will apply to the overseas departments unless the legislature expressly provides to the contrary, or if it is evident from the subject of the law that it cannot apply, or it is a law amending an earlier law not yet applied to the overseas territories.[52] The *Conseil d'Etat* has held that Parliament may also expressly provide that a decree may determine the conditions in which a law is to be applied to the new departments, and the law may then be modified by such decree, provided the amendments do not contravene the general spirit and essential provisions of the law.[53] Those matters, previously regulated by decrees, which have either not been the subject of metropolitan legislation, or in respect of which the appropriate metropolitan legislation has not been applied to the new departments as contemplated by the law of March 19, 1946, remain subject to the existing decrees until such time as Parliament otherwise provides, and can meanwhile be amended by the *Président du conseil* in virtue of the *Sénatus-Consulte* of 1854[54] and subject to the limitations there prescribed. As more and more of these matters come to be dealt with in laws which apply to the new departments, the powers of the Government to intervene by decree will be correspondingly reduced. Finally, the rules regarding local promulgation and publication of laws and decrees have been abolished and the powers of the prefects of the new departments assimilated to those of metropolitan prefects[55] though they retain special powers in matters of defence and economic affairs. Although, therefore, assimilation has been taken much further, some recognition of the differences of geography and social structure between France and the overseas departments has been allowed to temper the application of this principle.

Overseas Territories.—Article 72 of the Constitution sets out the "régime législatif" of the overseas territories:

"Dans les territoires d'outre-mer, le pouvoir législatif appartient au Parlement

[50] Lampué, *op. cit.*, p. 190.

[51] Besides the general references cited in note (49) v. also Chatelain, J., *Le Statut des Nouveaux Départements d'outre-mer* in Revue Juridique et Politique de l'Union Française, Tome II, pp. 307 *et seq.*

[52] v. *Avis du Conseil d'Etat* of April 29, 1947, in Lagrange, *op. cit.*, p. 91. For the position in Algeria *v. infra*, p. 28.

[53] v. *Avis du Conseil d'Etat* of December 17, 1946, in Lagrange, *op. cit.*, p. 89.

[54] *v. supra* note 10. *Avis du Conseil d'Etat* of November 12, 1946, and February 27, 1947, in Lagrange, *op. cit.*, pp. 87 and 90.

[55] Decrees of August 30 and June 7, 1947, respectively, both made in virtue of the law of March 19, 1946.

en ce qui concerne la législation criminelle, le régime des libertés publiques et l'organisation politique et administrative.

"En toutes autres matières, la loi française n'est applicable dans les territoires d'outre-mer que par disposition expresse ou si elle a été étendue par décret aux territoires d'outre-mer après avis de l'Assemblée de l'Union.

"En outre, par dérogation à l'article 13, des dispositions particulières à chaque territoire pourront être édictées par le Président de la République en Conseil des Ministres sur avis préalable de l'Assemblée de l'Union."

These arrangements reproduce the essential principles of the pre-war position. Parliament has an unlimited legislative competence in respect of the overseas territories, laws do not apply to them unless expressly stated or applicable in virtue of their subject, and the executive has power to legislate for them by decree. Two innovations are, however, made: in certain matters, a statute is essential, while the executive must consult the Assembly of the Union before legislating by decree, or even applying to the overseas territories metropolitan laws. It should also be noticed that Article 47 of the Constitution under which le "président du conseil des ministres assure l'exécution des lois" applies equally to the overseas territories, and that this traditional expression has always been considered as "conférant à l'organe exécutif le pouvoir de compléter les lois par des actes réglementaires."[56] Decrees made in pursuance of Article 47 thus do not require previous consultation with the Assembly of the Union. Although the first paragraph of Article 72 of the Constitution reserves to the National Assembly power to legislate for the overseas territories in certain matters, it has been decided[57] that this does not, *ipso facto*, invalidate existing non-statute laws in these matters unless and until they are the subject of new statutes. It has also been held[58] that statutes relating even to these three subjects do not apply to the overseas territories unless this is expressly provided. Further, it has been held that in extending metropolitan laws to the overseas territories by decree under the second paragraph of this article, the Government may adapt them to the needs of those territories.[59] All these rulings limit the apparently revolutionary effects of this Article, and in general principle the resulting "régime législatif" of the overseas territories is very similar to that of the "old colonies" under the Sénatus-Consulte of 1854, with the addition, the full effect of which cannot yet be assessed, of the compulsory consultation of the Assembly of the Union in legislation by decree.

Associated Territories.—So far as the "régime législatif" is concerned these territories may be regarded as in the same position as the overseas territories.[60]

Local Representative Assemblies since 1946.—Article of the Constitution institutes an elected Assembly in each territory and provides that the electoral procedure, composition and powers are to be determined by statute, while Article 78 provides that the management of common interests in groups of territories (e.g. French West Africa) is entrusted to an Assembly of members elected by the territorial Assemblies, and that the composition and powers will also be determined by statute. Article 85 states that the French Republic, one and indivisible, recognizes the existence of "territorial collectivities," namely, communes, departments, and overseas territories, which under Article 87 are administered freely by councils elected by universal suffrage. Article 89 provides, *inter alia*, that "organic laws" shall include special provisions for certain departments.

[56] Lampué, *op. cit.*, p. 173. *Note délibérée par le Conseil d'Etat*, December 31, 1947, in Lagrange, *op. cit.*, pp. 84-5.

[57] *Chambre Criminelle de la Cour de Cassation*, June 10, 1948, Revue Juridique et Politique de l'Union Française, Tome III, pp. 88-92, Note Chabas. Cf. also the views of the Conseil d'Etat on the similar point in respect of overseas departments, cited in Note (54).

[58] *Avis du Conseil d'Etat*, March 23, 1948, in Lagrange, *op. cit.*, p. 85; Lagrange does not accept this view. *v. ibid.*, pp. 23-5; nor does Luchaire, *op. cit.*, pp. 407-8.

[59] *Avis du Conseil d'Etat*, August 13, 1947, in Lagrange, *op. cit.*, pp. 81-84.

[60] *Avis du Comité Juridique de l'Union Française*, April 13, 1948, in Revue Juridique et Politique de l'Union Française, Tome II, pp. 242-7.

So far as the four new departments are concerned, the position is simply described. By a decree of November 1, 1947, pursuant to the law March 19, 1946 under which the four old colonies were transformed into departments, the law of August 10, 1871 as subsequently amended, i.e. the French law relating to the powers, etc., of the departmental *conseils généraux*, was applied to the new departments, though the previous provisions as regards the method of election of members were maintained.

As for the "local representative assemblies" of the overseas territories, a law of October 7, 1946 delegated to the Government power to fix by decree their composition and competence, and ten decrees of October 25, 1946 dealt with territorial assemblies in all the overseas territories except French Somaliland, which retained an assembly established by decree of November 9, 1945. When a new territory of Upper Volta was created in 1948 in French West Africa, the law of March 31, 1948 which instituted its representative assembly referred back to the arrangements of the decree of October 25, 1946 relating to the existing French West African territories. Assemblies for the two "groups of territories," i.e. the *soi-disant* federations of French West Africa and French Equatorial Africa, called Grand Councils, were established by the law of August 29, 1947.

The territorial assemblies (and the provincial assemblies in Madagascar, which are in practice comparable to the territorial assemblies in French West and Equatorial Africa) are elected on the common roll (*collège unique*) in the older colonies where all citizens possess the right to vote, e.g. New Caledonia, French India, Saint-Pierre and Miquelon, and Senegal, but elsewhere there are two *collèges*, one composed of all citizens of *statut français*, the other of those citizens of *statut local* who are electors, i.e. those who by the law of October 5, 1946 are electors of members of the National Assembly. Thus, the double college system applies somewhat more extensively in elections to the territorial assemblies than in the election of deputies.

The Grand Councils of the two groups of territories, French West and Equatorial Africa, and the territorial assembly of Madagascar, whose position in relation to the provincial assemblies in that colony resembles theirs in relation to the territorial assemblies, are elected indirectly, the two former by the territorial assemblies, each of which votes, for this purpose, as a *collège unique*, the latter by the provincial assemblies, the two sections each electing their representatives separately. Each of the local assemblies elects its permanent committee whose meetings are subject to the same provision as those concerning the similar bodies of departmental *conseils généraux*. The powers of these assemblies resemble those of *conseils généraux* and their activities are subject to a similar "tutelle." In certain matters they have powers of decision subject only to quashing by the *Conseil d'Etat* on grounds of illegality. Such matters include matters relating to public lands, the system of poor relief, co-operatives, cheap accommodation, the organization of savings banks and costs of litigation. Their decision regarding the budget is subject to approval, but only to the extent of seeing that the obligatory expenditure is provided for, while their decisions about taxes and loans require the approval of the *Conseil d'Etat*, or, in certain circumstances, a minister. They must be consulted on the drafts of *arrêtés* by the Governor or Governor-General on various matters, e.g. education, labour and social security, civil procedure, agricultural credit and many others. In Madagascar these powers and rights are divided between the territorial and provincial assemblies, while in French West and Equatorial Africa, they are divided between the Grand Councils and the territorial assemblies.

Similar assemblies have also been established in the two associated territories, where indeed the Trusteeship Agreement provides that the agreement of the territorial assembly is required if the administering authority wishes to organize essential public works and services, to create fiscal monopolies, or to establish public enterprises or joint undertakings, which may involve a departure from the régime

of equal treatment of nationals of all Members of the United Nations.[61]

Algeria.—In considering the Constitution of October, 1946, no mention has been made of Algeria, and indeed it is far from clear how it was supposed to fit into the categories established in Chapter VIII of the Constitution.[62] In fact in Algeria were to be found, "two nations warring in the bosom of a single state," the Europeans on the one hand, and Muslim Arabs and Berbers, on the other. Algeria, of course, had never been regarded as a colony but as a "prolongement" of France. This view led naturally towards complete assimilation—for the Europeans. But the existence of some eight million "natives" alongside the one million Europeans, led equally naturally to the conclusion that assimilation would not work and some degree of particularism was inevitable. Thus, in Algeria, local factors reinforced the normal interplay of assimilation versus administrative separatism which was the essential characteristic of the colonial policy of the Third Republic. On the one hand Algeria proper was divided into three departments, with the ordinary departmental organization, there were *communes de plein exercice* virtually identical with those of France, and although metropolitan laws did not automatically apply to Algeria, Parliament showed greater readiness to extend them to Algeria than to the colonies, while certain services (notably education and justice) were directly controlled by the appropriate metroplitan departments. On the other hand, there was a Governor-General controlling most of the services, Algeria had its own budget (since 1900) and its own representative assemblies, the *délégations financières,* entirely elected, and a Superior Council of Government, partly elected and partly nominated, both of which were replaced in 1945 by a financial assembly, while the majority of the inhabitants, though enjoying electoral rights under the Ordonnance of March 7, 1944,[63] were not citizens and the four *territoires du sud* were a separate administrative region, with their own administration and budget. With such a complex organization it was not surprising that the Constituent Assembly preferred to leave the position of Algeria to be determined by a special law, the *Statut de l'Algérie* of September 20, 1947. The effect of this law may be briefly summarized. Algeria is a group of departments[64] "doté de la personnalité civile, de l'autonomie financière, et d'une organisation particulière"; three organs are set up for this group as a whole, a Government-General, a Council of Government, and an Algerian Assembly. The Governor-General is the representative of the French Government but is not "dépositaire des pouvoirs de la République" (as he is in the overseas territories) and although he controls most of the Government services, some are directly under the appropriate metropolitan ministry. The Council of Government, over which the Governor-General presides, is composed of two members nominated by him and four elected by the Assembly. Its functions are to watch over the carrying out of decisions of the Assembly and it must be consulted by the Governor-General before he convokes an extraordinary session of the Assembly, or summons a committee outside the normal time of meeting, or declares illegal a decision of the Assembly: "il n'est jamais un organe de décision."[65] The Algerian Assembly has 120 members, half of whom are elected by each *collège.* The collège of *citoyens de statut français* includes also the various categories of citoyens de *statut*

[61] Trusteeshp Agreement for the French Cameroons (U.N. Document T/8, 1947), Article 9.

[62] For Algeria, see Lagrange, *op. cit.*, pp. 52-61. Lampué, P., *Le statut de l'Algérie* in Revue Juridique et Politique de l'Union Française, Tome I, pp. 477-525. Fabre, M. H., *Le classement réel l'Algérie dans l'Union Française* in Recueil Penant, Tome 53, II, pp. 1-32.

[63] *v. supra,* p. 16, Note (35).

[64] The law is silent (purposely, as the debates show) as to whether they are metropolitan or overseas departments, but it disposes of the problem of the "territoires du sud" by declaring them "considérés comme départements," pending the enactment of further legislation settling whether they will form separate departments or be integrated with existing ones.

[65] Lampué, *op. cit.*, p. 497.

local who were added to its predecessor by the Ordonnance of March 7, 1944 and some others, while the second *collège* is composed of the remaining *citoyens de statut local*. In the ordinary way, a bare majority of the Assembly suffices for a decision; but either the Governor-General or the Finance Committee of the Assembly or any thirty members of the Assembly may require for its validity a two-thirds majority, unless there is a bare majority for it in each section. It may be dissolved by decree if it does not vote the budget or meets illegally, and in such cases its powers are assumed by a special commission of 18 members elected by the three *conseils-généraux* (three members by each section of each *conseil-général*). The Governor-General may declare the acts of the Assembly illegal either as *ultra vires* or as having been arrived at during illegal sessions. Finally its decisions are subject to ratification by the metropolitan Government.[66] The Assembly votes the budget and taxation, subject to the limits imposed by customs assimilation, authorizes loans, concessions in respect of public works and services, and other similar matters. Its most important feature, however, is that it exercises legislative powers, subject to the ratification of the metropolitan government in all matters not either reserved to Parliament or the subject of laws.[67] Metropolitan laws do not apply to Algeria automatically, unless they are concerned with the exercise or guarantee of constitutional liberties, *statut personnel* (or *citoyens de statut français*), the organization of services which are "rattachés," i.e. directly controlled by the appropriate metropolitan department (justice and parts of the educational services) international treaties, and of course laws which apply in virtue of their subject. Certain matters are expressly reserved to Parliament, namely, judicial and administrative organization, military organization and recruitment, penal and civil procedure, criminal law, the law of real property, customs, and nationality. On all other matters, the Assembly may exercise the "pouvoir réglementaire." But once a matter has been the subject of a law, it cannot thereafter be the subject of a decree.

Although the arrangements made for Algeria by the law of September 30, 1947 are among the most interesting of the political experiments of this post-war French Union, especially in the grant of quasi-legislative powers to the Assembly, it must not be overlooked that the structure as a whole was heavily weighted in favour of the *colons*.[68]

The F.I.D.E.S.—The same recognition at the need for the provision of external financial aid to be made available to under-developed territories on terms far less expensive than the market rates hitherto prevailing, which led in Britain to the enactment of the Colonial Development and Welfare Acts of 1940 and 1945, resulted in France in the law of April 30, 1946.[69] This requires the Ministry of Overseas France to establish Ten-Year Development Plans for each of the territories with which it is concerned, within a period of six months. These plans will aim "d'une part, et par priorité, de satisfaire aux besoins des populations autochtones et de généraliser les conditions les plus favorables à leur progrès social; d'autre part, en concordance avec les plans établis par le Commissariat général du plan, de concourir à l'exécution des programmes de reconstitution

[66] If refusal to ratify has not been notified to the President of the Assembly within six weeks, the Governor-General must give the decision effect. If on the other hand the Government decides not to ratify, it must communicate its decision to the President of the National Assembly at the same time as to the President of the Algerian Assembly. Parliament is thus seised of the matter.

[67] "L'Assemblée algérienne peut, sur proposition de l'un de ses membres ou du Gouverneur général, prendre des décisions ayant pour objet d'étendre la loi métropolitaine à l'Algérie soit purement et simplement, soit après adaptation aux conditions locales ou d'édicter dans le cadre des lois, une réglementation particulière á l'Algérie." (Art. 14 of law of September 30, 1947.)

[68] Typical criticism of its actual working will be found in Jeanson, F., *Cette Algérie conquise et pacifiée* in Esprit, April, 1950.

[69] Text in *Rapport Annuel . . . sur l'administration du Togo*, 1947. Annexes, pp. 30-31. v. also Luchaire, F., *Les Programmes d'Exécution des Plans d'Equipement*, Recueil Penant, Tome 54, II, pp. 139-140.

et de développement de l'économie de l'Union Française, tant sur le plan métropolitain que sur celui des échanges internationaux." For this purpose, the Ministry is authorized to establish public corporations or joint undertakings, and to bring within varying degrees of public control new or extended private enterprises. There is established an Investment Fund for the Economic and Social Development of overseas territories (F.I.D.E.S.) provided in part by annual subventions in the metropolitan budget, in part by contributions from the territories themselves, and in part by long term loans made to the territories by the Central Bank of Overseas France at a rate of 1 per cent per annum. Contributions from the overseas territories must be voted by the local assemblies and cannot be used for development elsewhere without their consent. The Central Bank of Overseas France may also provide capital for public corporations or joint undertakings, and for development which forms part of approved programmes but is to be carried out by private enterprise or other organisms. The Fund is controlled by a Committee of Management, presided over by the Minister of Overseas France and including officials, four *parlementaires* appointed by the overseas committee of the National Assembly and two persons specially appointed "en raison de leur compétence en matière d'économie des territoires d'outre-mer." The means of carrying out this scheme have been revised in the decree of June 3, 1949, according to which each ten-year plan is replaced by annual programmes, divided into a General Section, produced by the Ministry and settled by the Managing Committee, and Territorial Sections for each group of territories, or separate territories. The latter are produced by the local administration and settled by the Local Assembly, subject to the concurrence of the Managing Committee; each is divided into a section for transport and communications, a section on production, and a section for social development.

V. Conclusion.—The Constitutional structure of overseas France before the war was not characterized by that logical simplicity commonly asserted by British writers. On the contrary, in its complexity and variety it reflected, quite as much as the British Colonial Empire, the different interests and theories which had prevailed at different times in the past, and the variations imposed by geographical, social, and cultural diversity. In particular, *assimilation,* though it remained the dominant ideology, especially as regards individuals, was nowhere fully realized, and both economically and administratively a large measure of territorial particularism prevailed. This pattern was not fundamentally changed, either as a result of war-time discussion or by the Constitution of 1946. The structure which has resulted from the post-war settlement is complex and represents indeed not only the continuation of the conflicting tendencies of the century before the war, but their more complete expression. Both *assimilation* and *autonomie* have a share in shaping the structure, but assimilation remains dominant. The most far-reaching achievement of the 1946 Constitution is certainly the divorce of citizenship and *statut français,* with the recognition that assimilation in the political rights of the individual cannot be made conditional on the acceptance of cultural assimilation. If the spirit of the Constitution can be preserved in this respect, its other major achievement is the recognition of two alternative destinations for the French colonies, the old assimilation with the métropole and a new autonomy within the French Union. The conception of an Associated State is one which, if worked out flexibly and unpedantically, might go far to meet the real needs of many colonial territories today. Experience since 1946 does not yet afford a sufficient basis on which to arrive at even a provisional assessment of the likelihood of such a development, but it must be recognized that the conception is one alien to many of the most profound political tendencies of the French, while the areas in respect of which it is being worked out, North Africa and Indo-China, are areas of critical importance and exceptional difficulty. Fear of the disappearance of French influence in these areas is deep and widespread and such fears are, *prima facie,* inimical to the chances of the concession of that genuine degree of autonomy without which participation in the French

Union will at least seem to involve the perpetuation of the colonial relationship. To a foreign observer, the real maintenance and, indeed, development of that "double-ended" conception of the French Union which is embodied in the post-war settlement, and the flexibility which is an essential feature of such an approach to the colonial problem appears the major task facing French statesmen today in their relations with what, unfashionable though the term may be, are still most accurately described as "colonial peoples."

ISLAMIC LAW AND CUSTOMARY LAW IN FRENCH NORTH AFRICA[1]

[*Contributed by* PROFESSOR G. H. BOUSQUET.]

I. General Indications about North Africa.—The Arabs rightly call this country *Djozira-t-el Maghreb* (*Jaziratu-l-Maghrib*) "the island of the West": it is indeed an island, separated from the Africa of the black races much more than it is from Europe, for, until very recently, the great desert of the Sahara was very much more difficult to cross than the Mediterranean. The distance from Marseilles to Algiers is only 700 kilometres* and Algiers is nearer to London than the cultivable lands of the Sudan.

This region looks very large on the map, but sociologically it is quite small. A strip of land, in places very narrow, running along the coastline, houses the immense majority of the population. This "island" has in fact somewhat the same shape as Chile but running latitudinally, not longitudinally.

In round numbers, the total population is twenty millions, of whom only 7 to 8 per cent are Europeans. A few hundred thousand are indigenous Jews; and the rest, roughly 90 per cent of the population, are a solid mass of Muslims.

The Muslims, although often called and calling themselves Arabs, belong mostly to races which have been settled here from prehistoric times. From the point of view of biology, the infusion of Arab blood has been weak; but from the point of view of sociology, the influence of the social and religious institutions of Islam has been very great. The population of North Africa has largely adopted Arab civilization—but not completely, as we shall see in a few minutes, when we come to consider the indigenous law of this region.

From the religious point of view, the Arab triumph has been complete, for, with the exception of a few small autochthonous groups, who were converted to Judaism long before the arrival of Islam, the whole indigenous population professes Islam. No doubt degrees of orthodoxy vary widely, but in practice all consider themselves Muslims; and, as the great Snouck Hurgronje has shown, that is what really matters politically and psychologically, in spite of the relics of paganism which still survive. Moreover, here as in other Islamic countries which have been brought under the control of Western powers, there has been a gradual sublimation of Islam. One may even say that the two great missionaries of orthodox Islam are what is commonly called colonialization and the autobus.

From the purely religious point of view, the situation is simplest in Morocco, where all Muslims belong to the Maliki rite. In Tunisia and Algeria the same is true of the immense majority, but we find a small minority of Hanafis in the towns (a reminiscence of Turkish rule) and also something less than a hundred thousand Muslim heretics belonging to the curious sect known as Ibadhites, or Abadhites (*'Ibadi*), a sect which exists also in Oman and Zanzibar. This sect by itself deserves a detailed study, for which we have not time today, and I can only tell you that, in Tunisia, it is not officially recognized: the orthodox law is applied. In Algeria on the other hand the French have allowed to this sect *qadhis* of their own religious persuasion.

[1] A Special University Lecture delivered in the University of London by Professor G. H. Bousquet, Professor of Islamic Law and Sociology in the University of Algiers.

In the few cases where the French method of transliteration of Arabic words used by Professor Bousquet might momentarily puzzle English readers, a transliteration based on the Royal Asiatic Society's method has been added in brackets.

* 450 land miles, not sea miles.

I come to two great lines of cleavage, one between the Arabic-speaking and the Berber-speaking peoples, and the other the division of political geography, between the two protectorates on the one hand and Algeria, which is almost an integral part of France like Brittany or Normandy, on the other. These distinctions must be borne in mind through the whole of what I have to say.

(a) The great bulk of the population ever since prehistoric times has been of a white race, or races, to which the name Berber has been given: but this is not an ethnological term, for it is quite certain that these Berbers belong to a number of different races of unknown origin. They have, however, in spite of diversity of dialect an underlying linguistic unity.

However, this prehistoric linguistic unity of North Africa—lightly touched in the towns by the Roman conquest—was wholly broken by Islam. The tongues most spoken at the present day are the various dialects of Maghrebi Arabic, but there remain Berber-speaking groups, in some cases extremely important; the fundamental test from the juristic point of view (subject to exceptions in detail of which I have not time to speak today), is that wherever the customary law has survived, the language is Berber, and wherever the Islamic law is firmly installed, the population speaks Arabic. Therefore, from the point of view of language and law, the triumph of Islam has been less complete than from the point of view of religion. I shall come in due course to a further consideration which I only mention now. The rule of Muhammadan law is, in some cases, effective and in others merely theoretical, in the sense that the population in fact continues, in spite of the existence of tribunals administering Muhammadan law, to live according to its ancient customs.

(b) In the whole of its history, North Africa has seldom or never, except at the present day, constituted a political and historical unity; and even today it does so only if we leave out of account the little Spanish zone of Morocco and the town of Tangiers. With these trifling exceptions, France, which conquered Algiers in 1830, rules today the whole of North Africa; nevertheless, in spite of this unity of external overlordship and in spite of its religious unity, North Africa is divided into three countries differing greatly both from a political point of view, and as regards the application of Muslim and customary law.

On the one hand, we have Algeria organized like Metropolitan France, in three French departments and, to a very great extent, assimilated to France. Since the reforms of 1944-45, the last stage in an evolution which had been going on slowly for a long time, the whole indigenous population are French citizens on an absolute equality with the French of Metropolitan France, except for the application of Muhammadan or customary law. Algeria comes under the Ministry of the Interior. On the other hand, Tunisia, which has been a French Protectorate since 1881, and Morocco, a Protectorate since 1912, have kept their local titular sovereigns, the Bey and the Sultan; they are therefore under the Ministry of Foreign Affairs.

II. Tunisia.—Let us begin with Tunisia, because there the situation is simplest. It is the smallest of the three countries, having a population of about three millions. Except for some insignificant pockets the whole population speaks Arabic, for which fact there is a geographical explanation: the country is less mountainous and nearer to the East than the rest of the Maghreb. On the other hand, the great mountain range of the Moroccan Atlas is the stronghold of Berber language and customs. In all that concerns the indigenous[2] administration of justice we must bear in mind the historical division of Muhammadan justice on which Snouck Hurgronje was wont to insist; religious justice on the one hand, and civil justice

[2] The word *"indigène"* has fallen out of favour in France very much as the word "native" has in the British Commonwealth. Nevertheless while disclaiming any offensive connotation which the word may have acquired, I find it difficult to avoid using it since there is no available substitute for it in such a context as the present lecture.

on the other. Civil and penal judicial administration is the province of the Caid (*Qa'id*), who is really an administrator; he sits as a court of first instance with an appeal to the court of the *Ouzara* (*Wuzara'*) in Tunis. Religious justice on the other hand, that is to say matters of *statut personnel,* succession at death and unregistered immovable property, is a matter for the court of the *Qadhi.* This court applies the Sharia, the Muhammadan Sacred Law, Maliki or Hanafi at the choice of the defendant, a choice which is not without possibilities of abuse.

What reforms have been introduced into this law? Very little, since the Maghreb, and particularly Tunisia and Morocco, is in this respect extremely conservative. In 1949 a code of *Shari'a* procedure was brought into force, but without greatly modifying the old rules. We should notice, however, that for a long while past, as in very many Muhammadan countries, there has been a definite hierarchy of courts quite contrary to the rules of the classical *fiqh.* In Tunisia this is as follows: *qadhi* sitting singly, *qadhi* assisted by a council (*medjlès, majlis*) of experts (*muftis*), the *medjlès* of Tunis, and finally the Bey himself.

On the other hand, the classical rules regarding guardians and wards were to some extent modified in 1944; and, in May 1941, the Bey of Tunis promulgated a decree setting limits to the amount of dower and of trousseau on marriage; but I understand that this sumptuary law had little or no effect. Among juristic reforms, however, I must mention two which are most important.

(i) Formerly the law of immovable property was for the most part, if not entirely, based on the rules of classical Muhammadan law. At the present day, however, an optional system of registration of lands has been introduced, a system based almost entirely on the principles worked out by Sir Robert Richard Torrens, which have been in force in Australia for about a hundred years. A mixed tribunal composed of French and Tunisian judges decides on application by the owner whether land is to be matriculated, that is to say, brought within the purview of this system, or not. If it is so matriculated, the entries in the register, which are made after verification of the transactions by the conservator of lands, who is responsible for the accuracy of such entries, are conclusive evidence. Matriculated lands are governed by French law, and cases concerning them are tried by French tribunals.

(ii) The other reform concerns the law of pious foundations, *h'abous* (*hubus*) as they are commonly called in the Maghreb (*maghrib*), or *waqf,* to use the word more usual in the East. Nearly everywhere in Islam the buildings of these pious foundations have been in a terrible state of disrepair and the funds often misappropriated: reforms have in recent years been widely demanded and in some countries achieved.[3] In Tunisia, under the French Protectorate, a central administration of *h'abous* has been created which functions very satisfactorily. On the other hand, the practice of the courts had many centuries ago invented various devices for rendering possible the sale or exchange of these "mortmain" properties, and there has since been legislation. There is room for a highly specialized study of these devices.

III. Competition of Shari'a and Local Custom.—We are now in a position to state certain principles applicable not only to Tunisia, but to the whole of North Africa.

(a) In theory the religious tribunals apply the classical Muhammadan law. In hard fact, however, the practice of the courts, even before the religious judge, has in some cases allowed a principle contrary to the Sacred law, the *Sharia,* to prevail. This is a phenomenon not particular to North Africa; we find the same thing in other Islamic countries. For instance, in Java there was by pre-Islamic custom a regime of common ownership of acquisitions by husband and wife.

[3] I was surprised to find in a short visit to India that the English, who had done such marvellous work there, had done nothing in this field, whilst the Nizam of Hyderabad had brought into force remarkable reforms. In that state Muslim and Hindu foundations figure on the same register, a great instance of toleration.

The religious judge recognized this by means of a fiction that there was a "*sarikat*" (in Arabic "*shirka*" or commercial partnership) between them. Similarly among the Muslim population of Yugoslavia before the war, repudiation or divorce was not valid unless it was registered, and the Qadhi sometimes refused to register if the motive for repudiation appeared to him insufficient.

Up to the present, however, these instances have not been sufficiently or systematically studied. On the other hand—and here no doubt we have a very important peculiarity of the Maghreb in Tunisia, and still more in Morocco—judicial practice has given rise to important works of law called books of "amal" (*a'mal*); and it appears that it was formerly so under Muhammadan rule in Andalusia.[4]

One point I desire to stress: I do not believe that local variations on the *fiqh* theme have always been very important, but they do exist. Here are a few examples chosen at random. In Tunisia, a clause is found in the marriage contract, commonly called the clause of the city of Kairouan, by which the husband promises to remain monogamous and to divorce his first wife if he ever marries another. Again at Fez in Morocco, a father who gives his daughter in marriage is obliged to furnish her with a trousseau double in value the dower paid by the husband. Another instance: in Morocco the very curious contract of *safqa* is recognized by the courts, in virtue of which, contrary to all the principles of Muhammadan law and indeed, I believe, of the common law of nations, an owner of an undivided share in immovable property has the power to sell the whole of such property to a third party, the other co-proprietors having no remedy but the choice of either accepting the situation and taking their share of the proceeds or of buying back the immovable property at the price fixed by him, thus repaying the seller his share of it—a position which is obviously very advantageous for him. Again, another instance: procedure before the *qadhi* in Morocco, instead of being oral and speedy, has become written and very lengthy. Finally, throughout North Africa, we have the contract of *khamessa* (Arabic *khums,* a fifth part) which is recognized by Maghrebi lawyers, though absolutely contrary to the religious law. By this contract, which is practically universal, the labourer receives the fifth part of the produce of the land on which he works.

You observe that all this could not be learned from the classical works of Maliki *fiqh* alone. It is an aspect of the Muhammadan law of the Maghreb almost unknown elsewhere. On these lines the jurists have sanctioned local usages and incorporated then in the law.

(b) I come to a further point. In fact, and from many points of view, the population of North Africa, even the Arabic-speaking population, though loyal in principle to Muhammadan law, continues very often to live according to usages which are not recognized by the courts, but which nevertheless from the sociological point of view are much more important than the texts of the jurists.

Here again one may find parallels in other Islamic countries. For example in Java, until 1938, successions at death were within the competence of the religious tribunals, but, in fact, in all cases where the matter was *not* taken into court, the successions were always governed by ancient pre-Islamic rules to such an extent that, in that year, the Dutch abolished the competence of the religious tribunals in this matter without exciting a single word of protest. You will see in a moment, why I refer to this example.

Similarly, in North Africa, social practice contradicts the Muhammadan law officially applied; and these divergencies are often very much greater than those recognized by the lawyers who have treated the subject of *amal.* Let me give one example which is probably true of other regions, but which I have verified

[4] Professor Milliot, formerly of Algiers and now of Paris, has the merit of having discovered the Moroccan "*amal,*" but for Tunisia and Andalusia the question has not so far been studied.

or the region of North-West Tunisia which is called Khroumirie. Muhammaden law gives large rights of guardianship to a mother, whether widow or divorced, over her young child. But in Khroumirie these rights are completely unknown in practice. A father takes the child away from the mother as soon as it is weaned; she has no further right of guardianship. This practice corresponds exactly with that of the customary law of Kabylie in Algeria, a region which remains completely Berber-speaking.

So much for the remarks which I have to make on the effective application of Muhammadan law in those part of North Africa where it is *officially* declared to be in force, particularly Tunisia. Let us now pass to the consideration of Morocco.

IV. Morocco. –We must distinguish in Morocco between the territories governed by Muhammadan law and those governed by Berber customary law. The latter is very important, since it is estimated that 40 to 45 per cent of the indigenous inhabitants of Morocco speak Berber. They live mainly in the mountainous regions.

(a) We will pass very rapidly over everything which concerns the application of Muhammadan law in the Arabic speaking countries; for both the state of affairs before the French protectorate of 1912 and the reforms subsequently made in this matter by France have a strong likeness with those which did and do prevail in Tunisia.

(i) To begin with, indigenous civil justice is two-fold. On the one hand there is religious justice, the court of the *Qadhi,* for which a court of appeal has been created at Rabat. On the other hand civil and criminal justice are administered by caids and pashas, administrative officers, with an appeal to the Sharifian High Court (the Sultan's Privy Council).

It is essential to note that neither in Tunisia nor in Morocco does any French judge or magistrate take any part in the administration of this local law, in contrast to the organization in Algeria.

(ii) Except for a decree about guardians and wards, which has in certain respects introduced Hanafi rules in this Maliki country, there have been no radical reforms of Muhammadan law. Morocco remains extremely conservative.

(iii) A reorganization of *h'abous* has been introduced on very much the same lines as in Tunisia, and the Torrens Act has also been introduced, but without the mixed tribunal which I have described in dealing with Tunisia.

To sum up, and overlooking technical details, we must say that Muhammadan justice and judicial administration are on very similar lines in Tunisia and Morocco.

But the great novelty here is the existence of Berber justice. After the French had completed the pacification of the country they found themselves face to face with great Berber-speaking populations, which, in their mountain fastnesses, had never submitted to the domination of the sultans and remained strongly attached to their ancestral customs. Profiting by her experience in Algeria, of which I shall speak in a few moments, France decided, in fact, to maintain the *status quo* and, in law, proclaimed this by the famous *"dahir berbère"* of the 16th June, 1930. I say "famous," because throughout the Islamic world there was an explosion of fury artificially fostered against French policy, which was said thus to have slammed the door against Muhammadan law in a country where, in fact, before the French arrival it had never been able to penetrate.[5] Yet, as I have said, in Java the religious judges were deprived of their competence in matters of succession without a single person protesting.

However that may be, the penal law today in Morocco is the same for the Arabic-speaking and the Berber-speaking territories: justice is rendered by the same courts according to the same rules and in the name of the Sultan. But

[5] I have seen with Snouck Hurgronje at Leiden some Batavian newspapers full of this.

for the civil law there are Berber customary courts administering Berber customary law. The only judges in these are Berber, and the decisions are their decisions. However, a French official representing the *Ministère Public*[6] takes part in the proceedings and in fact exercises very great influence—a thing for which there is no parallel in Tunisia nor in Arabic-speaking Morocco. There is an appeal to Rabat, the capital of Morocco. The system works well.

One futher point before leaving Morocco. Since about 1912 the French have initiated important scientific researches into the custom of the Berbers of Morocco (in this University one may fittingly remember with gratitude the name of your late Professor Westermarck). Nevertheless a synthesis of Berber customary law—or it would be better to say of Berber customary laws—has not yet been made. That is a development much to be desired.

Speaking for myself, I do not believe in a primitive unity of Berber custom in North Africa. No doubt one finds, or found, in Algerian Kabylie, just as in the High Atlas of Morocco, some similarly customary political institutions, such as *çoffs, leffs* and *anaia*.

Furthermore my lamented colleague, G. Marcy, who died at the age of 39, was wont to insist on the religious character, as he saw it, of Berber procedure, with the oath of compurgation as the essential method of proof, a procedure which is found no doubt throughout North Africa, but only exceptionally in Arabic-speaking lands. Nevertheless, the family laws of the Berber-speaking peoples reveal enormous differences.

For example, the Touareg Nomads have institutions which are in certain respects matrilineal; (one may mention in passing that they are also found among the Muslims of that part of Sumatra called Menangkabau and, until recently, among the Moplahs of Southern India). On the other hand, the Kabyles of Djurdjura in Algeria have a system of family law purely patriarchal and extremely harsh for the woman. Between these two extremes there are many intermediate stages. Therefore I do not believe in the primitive unity of the Berber customs.

V. Algeria.—Finally we come to Algeria, where the picture is very different in every way from Tunisia and Morocco. Here the French language is best known; the inhabitants are today, as I have already said, French citizens, just like those of Paris: and, although there is a Governor General and a special representative Assembly at Algiers, the system of law is almost exactly that applicable in France.

Accordingly, local law is here an exception. It exists only in the application of Muhammadan law and Kabyle custom in matters which concern the "statut personnel," succession and immovable property for those immovables which have not been brought within the purview of French law. For all the rest, French law applies equally to all the inhabitants. The same codes, civil, criminal, penal and procedure, etc. are applicable in the remotest village in the Algerian mountains, just as they are in Paris. What remains then of local law? We must distinguish here between Muhammadan law and the customs of Grande Kabylie.[7]

Because the people were Muslims, the French a century ago supposed that

[6] English legal ideas present no exact parallel to the French *Ministère Public;* but those Englishmen (by now fairly numerous) who have read Barthélemy's "Gouvernement de la France" will recollect what that author says of the *magistrature assise* and the *magistrature debout;* and the delicate part which the latter may play in shaping decisions. For our present purpose the nearest English parellel appears to be the Judicial Adviser to a Colonial Governor. Neither this officer, however, nor any of his staff take any direct part in the proceedings in the native courts of first instance or first appeal; their influence, unlike that of the *Ministère Public,* is exercised solely through the channels of administrative supervision and final appeal.

[7] In theory, with the exception of Grande Kabylie, which is very mountainous and was the last part of the country to be conquered in 1850, the Algerian people are subject to Muhammadan law; for the French in North Africa made the same mistake at the outset as the English did in India and the Dutch in Indonesia.

they were subject to Muhammadan law. It was only later that the persistence of local custom was recognized. In Algeria, there are still some 30 per cent of Berber-speaking peoples, particularly round the mountain range of the Aurès and the two Kabylies. Nevertheless the French have installed *qadhis* almost everywhere, even in territories of customary law (contrary to what they did later in the light of experience in Berber Morocco). Accordingly today in the Aurès the whole population lives under the rule of these ancient customs, except when there is litigation which comes before the Muslim religious judge. This was a regrettable mistake. Only in Grande Kabylie has a customary law been recognized.

(a) Let us speak first of Muhammadan law. In many respects this has been very much modified by French law and the practice of French courts. At the outset, we must notice one factor absolutely opposed to that which we have seen in the two Protectorates. There are, it is true, *qadhis,* but they are judges of first instance, and appeals are taken before French judges, namely the ordinary civil courts of first instance. Above them is a sort of *Cour de Cassation Musulmane* at the Court of Appeal in Algiers. Accordingly, French justice has a strict and continuous control over the application of Muhammadan law, a thing which does not exist in the Protectorates.[8]

As regards statute law, the French have interfered very little with Muhammadan family law, except for one decree promulgated in 1936 which reorganized the law of guardian and ward and created a *Conseil de famille,* borrowed from the French Civil Code.[9]

On the other hand, h'abous have been almost completely abolished in Algeria for nearly a century.

(a) There are no longer any public h'abous; those which existed have been annexed to the French domain, which has undertaken the responsibility for the necessary expenditure on religious buildings, hospitals, etc.

(b) Private h'abous are still numerous, for they are often used for the purpose of disinheriting daughters. But though they exist in principle, in fact they are no longer inalienable. So far as third parties are concerned, the person in lawful occupation of the h'abous is treated as its owner, so that the Algerian h'abous has become merely a privileged will. That is an astonishing development which I can only mention. It would take a whole lecture to explain it.

Let me mention very summarily some indication of the nature of French judicial influence:

(a) It systematically rejects the Maliki law, when the rules of the Hanafi rite more nearly resemble those of French law; for instance in the case of the consent of a young girl to her marriage.

(b) The rules of Muhammadan law regarding the guardianship of infants have been relegated to an altogether subordinate position. The principle is that the interest of the infant is in all cases the governing consideration.

(c) French justice often prefers written evidence to the evidence of witnesses —quite contrary to Muhammadan law.

(d) The French Government has also intervened indirectly. For instance, marriage today must be embodied in a formal document drawn up by the *qadhi* (a rule, however, which is often evaded), but the *qadhis* have received an order by the Procureur-Général to refuse such documents if the bride is less than 15 years of age.

(e) Muhammadan presumptions of evidence which are contrary to modern

[8] On the other hand we do not recognize the system which the Italians applied in Tripolitania, by which the judgment of the *Qadhi* had no effect without the *exequatur* of the President of the Italian court, whose powers of control were however limited to seeing that the *qadhi* had not exceeded his jurisdiction and that his decision was not contrary to "ordre public."

[9] Thirty years ago the then Dean of the Faculty of Law, Marcel Morand, as President of an official commission, published a project for a code of Muhammadan law which included far-reaching reforms, such as the abolition of the right to give a daughter in marriage without her consent. The code was never put into force.

scientific knowledge, as for instance that an infant may remain for many years in its mother's womb, are of course rejected.

Having illustrated the influence of French ideas in Muhammadan law, let us now look at the customs of Grande Kabylie. Here may be seen, even more clearly, how much further the influence of French civilisation has permeated the local law than in the two Protectorates.[10]

French influence has made itself felt in two ways:

(i) In the first place there are no longer in Kabylie any indigenous judges. There are only the French courts, *juges de paix* and a *tribunal d'arrondissement*. (The customary courts of the Kabyles, which were kept in being at the time of the conquest, have been suppressed, the last of them, I believe, about 1885.) But these French judges have always been, and continue to be, bound to administer the customary law. Here we have a remarkable paradox. The Kabyles are intelligent and hard-working men. Many of them earn their living in Metropolitan France and educationally (at any rate for their boys, though many have been for a long while bitterly hostile to female education) they have made enormous strides. In fact it is astonishing how widely the French language is spoken by men in this region.

And yet from the point of view of family law they continue to be governed by customs which you will agree with me are barbarous. Even customs which French law does not tolerate and which indeed no civilized law could tolerate, are difficult to suppress in opposition to the feelings and instincts of the people. Thus illegitimate children, and usually their mothers also, are normally put to death. The vendetta flourishes, as it did until the 19th century in Corsica, the succession of murders going on from family to family, and from generation to generation. But what is perhaps peculiar to Kabylie is the trade of the hired assassin, who will kill anyone for a definite price cash down. There are even brokers in this trade. I saw one last year, a most distinguished-looking person, who had just done ten years' hard labour.[11] But there are other customs almost as bad with which the French law did not until recently venture to interfere. The Kabyle woman, often while still immature, is sold for a price to her husband. She has no rights of inheritance and no right to divorce, not even the right which Maliki law would give her. The husband may divorce her at his pleasure; and, even so, may exact from the second husband (if she marries again) a money payment at his discretion. France hesitated for a very long while before attempting to interfere with these customs, and our judges applied them, deploring at the same time in their judgments that they had to do so.[12]

At last in 1930 and 1931 the legislature intervened with statutes governing the age of marriage and the right of the woman to divorce and, finally, granting rights of inheritance to women. On the first point the minimum age of marriage was fixed at 15 years of age. This limit was perhaps too high in view of the habits of the population: it has had some, but very little, effect. One may compare the Sarda Act in India, which has likewise been disregarded in many cases. I personally think that the reform needs reconsideration, probably on

[10] Outside this region live other Berber-speaking Kabyles who in fact, as we have already noted in the case of Aurés, have retained their customs, but whom we bring under the yoke of Muhammadan law. Last year I made a rapid local survey which fully confirmed the results of previous inquiries on this subject. These customs are very similar to those of Grande Kabylie, the main difference being in the organization of local government, which is carried to a very high degree. In Grande Kabylie before 1858 and even today every village forms a sort of autonomous republic with an astonishing particularist spirit. Here is a subject for absorbing and valuable research for a sociologist.

[11] All these people are French citizens today just as I am myself, with this difference that they can have four wives at a time and repudiate them without any formality whatever.

[12] In 1899 a *juge de paix*, M. Ricci, who is still living, had the courage to pronounce a divorce in favour of a Kabyle woman, but it was not until 23 years later that the court of appeal in Algiers admitted the legality of this reform.

the lines of demanding a certificate of puberty before marriage. It is certain that horrible abuses have been committed on the persons of immature girls and that in child marriages the death rate is very high.[13]

Secondly, the Kabyle woman has obtained in certain conditions the right to divorce her husband. Very gradually this reform is becoming engrafted on the habits of the people, at least in those parts of the country which are nearest to Muhammadan law. But very often the judgment of the French magistrate is, as my researches have shown, merely an element of discussion between the two families in inducing the husband to consent to divorce his wife in the ancient form and not to fix at too high a figure the price which (albeit nowadays forbidden) he will demand of a new husband. As the Latin adage has it: *quid leges sine moribus?*

Finally, French law has accorded a usufructuary right of succession on intestacy to the widow and the daughter, though for many years this reform remained completely a dead letter.[14]

Nevetheless the situation has begun to change, as I have been able to establish by inquiries recently made in this region. The Kabyle woman knows that she has rights which the French have given her. She dares to demand them from the judge, who decrees them to her. But when it comes to enforcing the judgment in the village the difficulty is immense and sometimes it is impossible. Shots are sometimes exchanged and eventually a compromise is arrived at in which the French judgment is only one element. All this is extremely interesting as showing how a new principle of law begins to find its way into the moral feelings of the people.[15]

VI. Conclusion.—In my view the principal interest of all these questions, as in other Muhammadan countries, may be summarized as follows:

Islam first came before the world as a doubly totalitarian system. It claimed to impose itself on the whole world and it claimed also, by the divinely appointed Muhammadan law, by the principles of the *fiqh*, to regulate down to the smallest details the whole life of the Islamic community and of every individual believer. In reality, however, it came into collision with other social forces and was compelled to compromise. It is one of the results of this inevitable compromise that I have set before you today, so far as it concerns North Africa. You have seen in what spheres Muhammadan law has succeeded in imposing itself on the people and where it has not triumphed. You have seen that it is in collision with Berber particularism on many points and has been compelled either to give up the struggle for power, or to arrive at a practical compromise. Finally you have seen how the citadel of Muhammadan law has begun to be breached under the influence of French civilization.

Viewed from this angle the study of Muhammadan law (dry and forbidding though it may appear to those who confine themselves to the indispensable study of the *fiqh*) is of great importance to the world of today. It is something which is alive, a social phenomenon in the full tide of evolution.

[13] Some years ago I was instrumental in bringing one such case in Algiers itself to the notice of the Public Prosecutor. But in the remote villages of Kabylie, who is there to intervene?

[14] I cannot resist the pleasure of referring here to the distinguished researches of my wife on this subject published in 1939 under the title *La Femme Kabyle*. (Thèse, Alger 1939.)

[15] The same sociological interest attaches to the reforms which the Prophet Muhammad introduced into the ancient Arabian law of succession and similarly to the evolution of the old Germanic laws, Frank, Lombard, Burgundian, and others. On this point see Peltier et Bosquet, *Les Successions agnatiques mitigées*.

PENAL CLAUSES IN CONTRACTS: A COMPARATIVE STUDY*

[*Contributed by* NORMAN S. MARSH, ESQ.]

I. HISTORICAL BACKGROUND

* This article is based on a report read to the Third International Congress o Comparative Law. I am much indebted to M. Daniel Veaux of the University of Renne and Professor J. Esser of the University of Mainz for information on the French an German law respectively. A fuller account, emphasizing in greater detail the paper which M. Veaux and Professor Esser presented, will, it is hoped, be published with th official "Acta" of the Congress.

IN Roman law the penal stipulation served two main purposes. On the on hand, it was the appropriate method of enforcing promises made by one perso with regard to an active performance or an omission of another. On the othe hand, it was a useful method, as Justinian points out in the Institutes (III, 15 7) of avoiding difficulties of proof with regard to damage suffered. Althoug in general Roman law was not averse to penal damages in excess of the actua damage suffered, it does not seem that, apart from the case where otherwis no remedy at all would have been provided, the object of a penal stipulatio was to hold a threat of heavy loss over the head of the promisor, irrespectiv of the actual damage suffered. Thus if, for example, in a contract of sale the defaulting party had been condemned under the sale, the other party woul be met by an *exceptio doli* if he also sued on the stipulation.

The emphasis was on the recovery of damages for the actual loss suffered t which the penal stipulation was incidental, as is shown by Justinian's ruling (D 19, 1, 28) that where the penal sum recovered was, in fact, less than the actua loss suffered, an action could be brought for the excess. Nevertheless, it doe not seem that, in Roman law up to and including the time of Justinian, an limit was fixed on the amount of a penal stipulation in relation to the ac or omission which it guaranteed.

Later writers in Roman law differed as to the limits imposed on penaltie in excess of the actual damage suffered. Azo was of the opinion that an agree penalty, whatever its size, could not be reduced and was enforcible as it stood DuMoulin (Traité de Eo quod Interest No. 159 *et seq*) argued that Justinian' enactment (C. vii. 47 de Sent. pro eo quod interest, etc.), limiting the amoun of damages recoverable in contracts such as sale to double the value of th things sold and in other cases requiring only moderate damages, was of genera application and covered in particular penal stipulations. This view of DuMoulin' is supported by van Leeuwen (Censura Forensis iv, xv, 2), by Voet (45, i, 1 and by van Bynkershoek (Quaestiones Juris Privati bk. 2. C. 14). A interesting survey of this development was given by Lord Tomlin, delivering th judgment of the Privy Council in *Pearl Assurance Co. Ltd. v. The Governmen of the Union of South Africa* ([1934] A.C. 570) where he pointed out that a the writers who favour a possibility of reducing the penalty make such a poss bility depend on the amount of the damages actually resulting from the breach South African law has abandoned this approach and, in harmony with Englis law, as will be seen below, makes the test of enforcibility with regard to penalt the intention of the parties as expressed in the covenant.

II. FRENCH LAW

In striking contrast to the majority of previous juristic opinion, the make of the Code Civil refused to allow the court to reduce a penalty agreed betwee the parties. In the *Exposé des Motifs* of contracts and conventional obligatio in general (Livre III, Titre II, Procés-Verbaux du Conseil d'Etat, tome iv, p.19 Bigot-Préameneu stated this principle in uncompromising terms:—

> "La peine stipulée par les contractants fait la loi entre eux. Le créanci ne doit pas être admis à dire que cette peine est insuffisante, ni le débite

à prétendre qu'elle est excessive. Quel serait le juge, qui mieux que les parties, pourrait connaître les circonstances et les intérêts respectifs qui ont déterminé la fixation de la peine?"

It is remarkable that this insistence on the sanctity of contracts with regard o penal stipulation which is to be found or implied from articles 1226, 1134, and 152 of the Code Civil has persisted up to the present day, and especially in a eriod when, in general, the theory of contract as the expression of the will of ne party is on the decline. Even as recent as 1940 we find the Chambre Civile D.H. 1940, 161) quashing a decision which in the name of justice and equity ad allowed a sum less than that fixed by a penal clause to be recovered, the ourt emphasizing that, in the words of article 1134, "Les conventions légalement ormées tiennent lieu de loi à ceux qui les ont faites."

The policy thus pursued by the French courts is not without its dangers, specially where there is a great disparity of power between the contracting arties. This may arise either when the penalty fixed is much larger than any amage which may result or when the penalty is excessively small in relation o the damage. French courts have, in fact, imposed some limitations on heir own doctrine:—

(a) Expressly by Article 1231 of the Code Civil, which gives the judge power to modify a penalty where the principal obligation has been in part performed. This is not however inconsistent with respect for the will of the parties, because it is not to be presumed that the parties would have intended the full penalty in the event of only partial non-performance. Furthermore, the courts have interpreted Article 1231 to mean that it does not apply if a contrary intention of the parties can be shown; such an intention may be implied as well as expressed.

(b) In cases where the fixing of an excessively small penalty in effect enables one of the parties to exclude liability. It is a principle of French law that contracts cannot exclude delictual responsibility for *faute lourde* or *dolus*. Thus, in one case (D.H. 1936, 242) it was held that a penal clause in a contract, whereby a transport undertaking had restricted its liability within narrow limits, did not prevent the award of full damages resulting from a *faute lourde* such as the bad maintenance or excessive age of materials employed.

The Legislature has shown less respect than the courts for the maxim, *pacta unt servanda*. For example, the law of December 27, 1890, as amended by he law of July 19, 1928, gives a party to a contract of employment the right o demand an indemnity if the contract is terminated by the will of one of the arties only and forbids the party to renounce the right by prior agreement. A enalty stipulated against such a unilateral termination must be reviewed by he courts to see if it is, by reason of its nominal amount, tantamount to a rohibited renunciation of the claim to an indemnity. Similarly, it should be orne in mind that the law of September 3, 1807 in effect restricted the scope f a penal clause, where the principal obligation was only to pay a money sum, y laying down a maximum for agreed interest. This restriction was abolished or commercial contracts in 1886, and suspended (but never re-introduced) for ther contracts in 1918. But a law of August 8, 1935 condemns as usurious greed rates of interest more than 50 per cent above the lowest prevailing rate for similar risk. There is also the important law of February 5, 1932 (Code du ravail, *livre* I *art.* 22b) which restricts penal clauses in workshop regulations, naking them subject to the approval of public authorities and never for the inancial benefit of employers.

It is possible (though outside my limited knowledge) that other special egislation has to a greater or lesser extent restricted the scope of penal clauses n French law. As will be seen below in English law the legislature, although y no means the only restraining influence, has for long been unfriendly to penal lauses in contracts.

III. German Law

The treatment of penal clauses in French and German law is very different. This is partly explained by the fact that French (and Austrian) law consider penal clauses in the law of obligations primarily as a method of leaving the assessment of damages to be agreed between the parties, whereas in German and Swiss law the penal clause serves a wider variety of purposes. In the latter systems therefore there is not the same inclination on the part of the courts to emphasize the importance of giving effect to the will of the parties. On the other hand the fact that French law on penal clauses stands by itself, whereas Austrian law is broadly similar in its treatment of such clauses to German and Swiss law, shows that other factors have to be taken into account. These other factors may be traced back to Article 1336 II of the Austrian Civil Code of 1811, which gives the Court power to reduce a penalty which is disproportionately high in relation to the actual loss incurred. This article followed the prevailing juristic opinion of the 17th and 18th centuries (as explained in Section I above) which was regarded as binding law on the Continent, until the changes made in France by the Civil Code. Article 1336 II of the Austrian Civil Code was not followed in the first draft of BGB, but was finally incorporated in the BGB Article 343; a similar article (163 II) is to be found in the Swiss Law of Obligations.

But the full extent to which German law is prepared to interfere with the sanctity of contract is not fully apparent from a mere reading of Article 343 of the BGB. On the other hand, in some respects Article 343 appears to interfere with this sanctity to a greater extent than in fact is the case, taking German law as a whole.

A. Extent to which a penal clause may be invalid

(a) It should first be noted that Article 343 of the BGB cannot be excluded by private agreement between the parties. In private international law it is operative even when a contract has in other respects to be interpreted by reference to foreign law.

(b) Article 343 has by analogy been applied to cases where a penal sum in the narrow sense is not payable, although on failure to perform an undertaking a clause comes into effect which has a penal character: for example—to quote the examples given by Enneccerus, Lehrbuch, Band II, 13th edition, p. 145—where there is a reduction in wages, raising of interest rates, or lowering of the purchase price on failure to perform an obligation. The scope of the rules as to penal contracts is narrower in English law (e.g. where the full sum becomes payable on failure to pay an instalment in an instalment contract—see Section V below).

(c) Whereas in French law, as has been seen above, the fixing of a very small penal sum excludes other remedies (unless thereby liability for *faute lourde* or *dolus* has been altogether excluded), in German law it is possible to sue for any loss incurred in excess of the penal sum. Indeed it is in certain circumstances possible to claim both the penalty and the execution of the principal obligation.

(d) Apart from its powers under Article 343 of the BGB, the court may refuse to enforce a penalty on the grounds that it is against *die guten Sitten* and hence contravenes Article 138.

(e) Similarly, the court may refuse to permit the recovery of a penalty on the ground that it offends against Article 157 requiring *Treu und Glauben* in the interpretation of contracts. This gives the court a very wide discretion to take into account the object of the penalty, its size in relation to the obligation to be enforced, whether the penal clause is to be interpreted to cover innocent and/or guilty breaches of the obligation, and its use in contravention of Articles 226 (on "abuse of rights") and 242

(requiring *Treu und Glauben* in the performance of obligations). As Dr. Cohn has observed (Manual of German Law, p. 62) the extensive application of the concept of *Treu und Glauben* reminds an English lawyer of the functions performed by the Court of Chancery in the development of equitable concepts. Thus, as will appear below, it was in the Court of Chancery that objection was first raised to penalties, but in English law there is no longer a difference between the equitable and common law attitude and the rules—apparently unlike German law—do not give a wide discretion to the courts.

B. Extent to which German Law refrains from interfering with penal clauses

(a) An important exception to Article 343 of the BGB is provided by Article 348 of the HBG, whereby it is laid down that a penal sum be paid by a mercantile trader (*Vollkaufmann*) cannot be reduced by the Court. However even such an undertaking must not offend against *die guten Sitten* and must observe the requirements as to *Treu und Glauben*.

(b) Earnest money when forfeitable on failure to carry out an undertaking (*Reugeld*) implies in a wider sense a penal clause. But Article 343 is not applicable. English law, directly influenced for once by Roman law, comes to a similar conclusion (*Howe v. Smith*, (1884), 27 Ch. D. 89).

IV. English Law

If it is necessary to decide whether English law as to penalties in contracts is closer to French law or to German law, there is no doubt that English law must be placed with the latter. But in fact English law has developed along its own lines and differs in principle from the French and German systems.

It does not seem possible to trace any direct connection between the line of juristic thought on the Continent (which, as has been shown above, from Du Moulin onwards has favoured a discretionary power in the courts to reduce an excessive penalty) and the parallel development in English law. From the time of Edward IV onwards the Chancellor began to give relief against the enforcement of bonds according to the strict letter of their meaning, first of all where the bonds had been fraudently obtained, later where repayment was delayed for some special reason and finally whenever repayment with interest was offered. A bond is an undertaking to pay a certain sum which will not be enforceable if, within a certain time, a smaller sum or a particular act is performed. In the second half of the 17th century we find cases in which equity refused to enforce bonds where the act which would discharge payment of the full amount was not merely the payment of a lesser sum but the performance of some other kind of act. Thus in the rather picturesque case of *Tall v. Rylands* ((1674), 2 Ch. Ca. 198) the plaintiff and the defendant were fishmongers. The plaintiff gave a bond for £20, conditioned (i.e. which would not be enforceable provided he continued) to behave himself civilly and not to disparage the defendant's gods. "The plaintiff afterwards asked the defendant's customer whilst cheapening, i.e. bargaining for—a parcel of flounders why he would buy of the defendant, and told him those fish stank, and so the defendant lost their custom." A Bill in Equity was refused to the plaintiff to relieve him of the £20 penalty; but Sir Orlando Bridgman (Lord Keeper) deprived the defendant of his costs and said that the case must not be regarded as a precedent for a case of a bond of £100 or the like.

The jurisdiction which equity had thus established over bonds in which a penalty had been inserted to secure the payment of principle and interest, and over other bonds and covenants conditioned on the performance of a particular act, was a serious challenge to the Common Law Courts. This challenge was met not by prohibiting equitable modification of penalties but by giving to the Common Law Courts by Acts of Parliament the powers which the Court of Chancery already enjoyed (8 and 9 Will. III c. 11 and 4 and 5, Anne

c. 16). In spite of the Acts of Anne and William III the Common Law Courts do not appear at first to have taken much advantage of their powers, whereas the Courts of Equity continued to give relief against penalties, albeit with some uncertainty as to the principle on which they were acting. There does not appear to have been any objection in principle to the idea of a penalty as such, which had not merely the purpose of avoiding future difficulties as to the assessment of damage but also was avowedly designed to act *in terrorem* to prevent a breach. But such a penalty had not to be excessive; at this stage (middle of the 18th century) English law resembled continental law and modern German law. Thus in 1741 in *Roy v. Duke of Beaufort* (2 Atk. 190), where a bond for £100 was given conditioned on continuing not to poach, Lord Hardwicke as Lord Chancellor is not afraid to commend the penal effect of such bonds:—"I do not know that Courts of Equity, where a bond is entered into voluntarily, have gone so far as to take into their consideration the greatness or smallness of the penalty. I shall be extremely cautious how I give an opinion that will set aside such bonds, which if rightly used may be of great service in the preservation of game and of equal benefit to the obligers themselves in taking them out of an idle course of life which poaching naturally leads them into." On the other hand, in 1783 in the important case of *Sloman v. Walter* (1 Bro. C.C. 418) the then Lord Chancellor, Lord Thurlow, relieved against a penalty of £500 inserted in order to secure performance of an undertaking to allow a sleeping partner in a coffee house the use of a particular room.

At this point (i.e. in the second half of the 18th century and the beginning of the 19th century) English law began to develop in a different way from Continental law. On the one hand we have the almost unqualified insistence in the French Civil Code on sanctity of contract and consequent enforceability of penalties. On the other hand we have the well-established juristic doctrine that a penalty should be reduced if it is excessive. English law dislikes excessive penalties but it is, like the French Civil Code, anxious to emphasize the sanctity of a contract. The result is the characteristically English distinction between *liquidated damages* and a *penalty* in the strict sense.

Where the sum fixed is a reasonable pre-estimate by the parties of the damage it cannot be reduced by the court, nor can a party who has in fact suffered more damage sue for the excess. Thus in *Cellulose Acetate Silk Co. v. Widnes Foundry* ([1933] A.C. 20) the erectors of certain plant covenanted to pay £20 a week for every week exceeding eighteen occupied in the erection of the plant. the period was much exceeded and the Silk Co. argued that this sum was a penalty and that they were entitled to a large sum as unliquidated damages. The House of Lords held, however, that the Co. was limited to the damages of £20 per week which was an agreed sum to cover compensation for delay. A penalty on the other hand is a sum payable on breach which is not a reasonable pre-estimate by the parties of a damage likely to be suffered but has been inserted in the agreement simply and solely to secure its performance. As was said in a Scottish case, "if the penalty be truly a penalty—that is a punishment—the court will not allow that, because the law will not let people punish each other" (Lord Young in *Robertson v. Driver's Trs.*, ([1881], 8 R. 555). Scotland, it will thus be observed, has adopted the English distinction between liquidated damages and penalties in the strict sense. The same is now true of South African law, as may be seen from the decision of the Privy Council in *Pearl Assurance Co. v. Government of the Union of South Africa* ([1934], A.C. 570) where the earlier authorities are exhaustively reviewed.

If the sum is a penalty, then the party to whom the sum was payable may ignore the penalty and sue for the actual loss incurred. Although this was at one time doubted, it appears to be the law since *Wall v. Rederiaktiebolaget Luggude* ([1915] 3 K.B. 66) which was approved by the House of Lords in *Watts, Watts and Co. v. Mitsui* ([1917] A.C. 227).

But as the courts have to decide in each case whether in fact the sum fixed

was liquidated damages—i.e. a reasonable pre-estimate of the damage likely to be suffered—or a penalty, they have in fact reserved themselves a wide measure of discretion. Although this discretion is exercised in accordance with certain presumptions, it is probably true to say that in cases of doubt the English Courts have permitted penal clauses to be interpreted as liquidated damages in order to maintain their well-established regard for the sanctity of contract. Indeed it is possible throughout the cases to find instances of judges accepting the rules as to penalties with resignation rather than enthusiasm.

The following rules have become established for determining whether a sum is liquidated damages or a penalty.

(a) Where the breach of contract consists of of the non-payment of a sum of money a stipulation for the payment of any larger sum must always be penal.

(b) Where the breach of contract consists of the non-performance of a single act a provision for the payment of a certain sum will be penal if its object is merely to compel the party to perform the stipulation (i.e. if it works *in terrorem*) but it will be treated as liquidated damages if it is a genuine pre-estimate of the actual damage suffered. For example, in *Clydebank Co. v. Don Jose v Casteneda* ([1905] A.C. 6) a sum of £500 per week for delay in the non-delivery of four torpedo boats was treated as liquidated damages mainly on the grounds that the damage to a State by the non-delivery of warships was difficult to estimate and that therefore the value put upon performance by the parties should be accepted. In fact, cases which fall under this heading seem so rarely to be regarded by the Courts as imposing penalties that it is tempting to state that where the breach depends on the single act of non-performance and the possible damage is uncertain at the time of making the contract English law is not very different from French law.

(c) Where there is a stipulation for the payment of a single sum in the event of the breach of any of a number of stipulations in the contract, there is a presumption that such a sum is a penalty; but this presumption can be rebutted by showing that the particular sum is not an unreasonable estimate of the damage likely to ensue from any individual breach. Thus in *Dunlop v. New Garage* ([1915] A.C. 79) where there were a number of stipulations with regard to Messrs. Dunlop's tyres and a sum of £5 payable for every tyre, cover or tube sold completed the agreement. It was held that £5 was a reasonable pre-estimate of the damages for breach or the possible breaches of contract and could therefore be recovered as liquidated damages.

(d) There is a presumption that a sum which is described as a penalty is in law a penalty and that a sum which is described as liquidated damages is in law liquidated damages; but this presumption is easily rebutted.

If it is true, as has been submitted, that English law has some resemblances in *form*, as far as penal clauses are concerned, to German law, but that *in spirit* it is closer to French law, then it is not surprising to find that the distinction between a penalty and liquidated damages is kept within a fairly narrow field. Apart from cases of deposits forfeitable on failure of the deposit or to perform the contract (which are valid irrespective of whether they constitute a reasonable pre-estimate of the damage likely to be suffered—see *Howe v. Smith* (1884 27 Ch. D 89)) certain types of instalment contract permit what is in effect a kind of penalty. For example, where an agreement is made for the payment of money by instalments a proviso that, on failure to pay a particular instalment, either the whole sum shall become immediately due or that the instalments already paid shall be forfeited may have a penal effect. (See *Protector Loan Co. v. Grice* (1880), 5 Q.B.D. 595 and *Mussen v. Van Diemen's Land Co.* ([1938] Ch. 253.))

But although it may be true that the English Courts in spirit have not been so very far from the spirit of French law, on the other hand the Legislature has

looked on penalties with disfavour and in various cases has in effect treated as a penalty, against which relief can be given, what the courts were prepared to treat as liquidated damages. For example, by the Agricultural Holdings Act, 1923 any clause in a contract, whereby a tenant of agricultural land undertakes to pay a higher rent on breach of a covenant, is with certain exceptions to be disregarded and the landlord only entitled to recover the damage actually suffered. The courts had previously recognized such clauses as providing for liquidated damages. Again, the Legislature has intervened to include transactions which were outside the scope of the rules as to penalties altogether; as for example with regard to instalment sales for less than £100 by the Hire Purchase Act, 1938. The penal effect of a forfeiture of instalments already paid on failure to pay a single instalment is mitigated by the provision that the owner of the goods has to apply for leave of the Court to regain possession of the goods, if one-third of the hire-purchase price has already been paid. And, finally, even where the courts were themselves prepared to relieve against clauses having penal effect, as in the case of forfeiture for non-performance of covenants in a lease, the Legislature has intervened to put the law on a more certain and secure basis (see Common Law Procedure Act, 1852 and Section 146 of A.P.A. 1925 as amended by the Landlord and Tenant Act, 1927).

V. Summary and Conclusion

In French law the penal clause recognized in the Civil Code has shown a remarkable power of survival up to the present day, and its effect is only modified where either the principal obligation has been partially performed or where the fixing of an excessively small penalty would in effect allow one of the parties to exclude delictual responsibility for *"faute lourde"* or *dolus*.

German law, following in a tradition which had been established by Continental Jurists from DuMoulin to Pothier and which found expression in the Austrian Civil Code of 1811, gives the Court power to reduce a penalty which is disproportionately high in relation to the actual loss incurred. But German law does not interfere with the penalty in this way where the penal sum is to be paid by a mercantile trader (*Vollkaufmann*). In this respect over an important field of commercial law German law is near to French law; on the other hand the German Civil Code appears by its insistence on *"die guten Sitten"* and *"Treu und Glauben"* to have very wide powers of interfering with all legal transactions even in the sphere of commercial law.

English law, having developed a doctrine in the Court of Chancery apparently independently of Continental jurists, resembles German law in its readiness to interfere with a penal sum fixed by the parties; but its concern is to see, not that the penal sum is excessive from the standpoint of objective justice, but that the sum fixed is a reasonable pre-estimate of future possible loss by the parties at the time of the making of the contract. In fact, in deciding what has been the subjective attitude of the parties, English law in spirit is rather close to French law—i.e., favours the sanctity of contract and is prepared wherever possible to find that a sum fixed by the parties is liquidated damages and not a penalty.

The distinction between the three systems of law can perhaps best be made clear by an example. A undertakes to deliver to B in a year's time 100 tons of a certain commodity at £100 per ton. The penalty for non-delivery is to be £20 per ton. A fails to deliver 50 tons; but by the time the year has expired the market price of the commodity has fallen to £50 per ton so that B has in fact saved £50 per ton on the 50 tons which A has failed to deliver. In French law it seems clear that B can recover the penalty of £50 × 20 = £1,000. In German law, if A was a *Vollkaufmann* he may have to pay the £1,000 unless it can be said that insistence on payment would be against *"die guten Sitten"* or *"Treu und Glauben."* Any other party in German law might apply to the Court to reduce the penalty on the ground that it was excessive in relation to the actual loss incurred; indeed it would seem that no loss has been incurred

and therefore there should be no penalty at all. In English law on the other hand, the question would turn on whether, when the contract was made, £20 per ton was a reasonable *bona fide* pre-estimate by the parties of the loss which would be incurred a year ahead on failure to deliver the commodity. If it was such a reasonable pre-estimate, the £1,000 would be recoverable, otherwise it would be a penalty in the strict sense and not recoverable.

NOTES ON CONSTITUTIONAL DEVELOPMENTS IN THE COMMONWEALTH

APPEALS TO THE PRIVY COUNCIL

[*Contributed by* Z. COWEN, ESQ.]

DURING the last year, three Dominions have abolished the appeal to the Judicial Committee of the Privy Council. In Canada, by the Supreme Court Amendment Act (assented to December 10, 1949), it is provided that the Supreme Court of Canada shall exercise ultimate appellate civil and criminal jurisdiction within and for Canada, and that its judgment shall in all cases be final and conclusive. The constitutionality of this provision had been affirmed earlier by the Judicial Committee in *A.G. for Ontario v. A.G. for Canada*,[1] where it was held that since the Statute of Westminster, such legislation was *intra vires* the Dominion. This year, the Parliament of the Union of South Africa has also abolished the appeal. This measure, and its antecedents are discussed in detail below.[2] It is interesting to recall that the first Dominion lawyer to sit on the Judicial Committee under the terms of the Supreme Court (Amendment) Act 1895 was the distinguished South African judge, Lord de Villiers.[3] The Pakistan Constituent Assembly in April, 1950 enacted legislation abolishing the appeal to the Judicial Committee, and as from May 1, 1950, the new Federal Court of Pakistan became the final court of appeal.

In *Commonwealth of Australia v. Bank of New South Wales*,[4] it was strenuously argued by the appellants that a restrictive interpretation should be placed on s. 74 of the Commonwealth of Australia Constitution Act which provides that no appeal should lie to the Judicial Committee upon any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court of Australia should certify the question to be one which ought to be determined in the Judicial Committee. The appellants argued that a case did not fall within s. 74, and therefore a certificate of the High Court was not an indispensable prerequisite to an appeal, unless there had been a specific decision in the High Court adverse to appellant on an *inter se* question which he and he alone wishes to challenge, and that it was erroneous to argue that a certificate was required merely because an *inter se* question had been raised before the High Court and might have to be decided on the appeal to the Privy Council. The Judicial Committee rejected this argument, holding that "the certificate of the High Court is necessary whenever the appellant cannot obtain the relief that he claims without the determination of an *inter se* question."[5] This point is discussed by Professor Sawer elsewhere in this Journal.[6] The importance of the ruling, as Lord Normand (himself a member of the Board in the Bank case) has observed in a recently published address, is that "the Privy Council has

[1] [1947] A.C. 127.
[2] See p. 83.
[3] Law Journal, Vol. C, p. 314. (June 9th, 1950.)
[4] [1950] A.C. 235.
[5] [1950] A.C. 235, 298.
[6] See p. 25.

given the fullest recognition to the principle that these *inter se* questions are domestic questions for Australia."[7] The High Court has only once granted a certificate under s. 74, in *Colonial Sugar Refining Co. Ltd. v. A.G. for the Commonwealth*,[8] and unless there is a drastic change of policy on the part of the High Court, it seems that the broader interpretation of s. 74 favoured by the Judicial Committee will mean that appeals on constitutional questions will come to it infrequently. It should be observed however, that not every constitutional case involves an *inter se* question.[9]

Following the earlier disappearance of the appeal from India and Palestine, its disappearance from Canada, South Africa (where however, it was rarely exercised in latter years) and Pakistan has, at least for the time being, sharply curtailed the imperial jurisdiction of the Privy Council. The Easter list of the Judicial Committee contained only ten Commonwealth cases: six from Ceylon, one from the Falklands, two from the West African Court of Appeal and one from Nigeria.[10]

In view of the fact that much was made in Commonwealth debates on the Privy Council appeal in recent years of the lack of expert knowledge on the part of a final Court of Appeal largely manned by United Kingdom judges, and of the alleged repugnance to Dominion sovereignty in the continued existence of such an appeal, Lord Normand's comment in the address referred to is of particular interest:

> "There has been no thorough-going attempt to draw into the service of the Judicial Committee the wealth of legal experience and ability available within the Empire or to make it truly representative of the King's dominions as a whole. Had that been done, a further step, sometimes discussed but never carried beyond discussion, might have been possible: it has been pointed out that the Judicial Committee need not be pinned down to Whitehall, and that the King's Council should be free to sit in any part of the King's dominions as the convenience of the King's subjects may require. The aeroplane has now made such a change practical, but too late!"[11]

NOTES ON RECENT CANADIAN CONSTITUTIONAL DEVELOPMENTS

[*Contributed by* W. R. Lederman, Esq.]

Recent months have witnessed important constitutional developments in Canada, the theme of which has been that basic constitutional powers and procedures should become entirely domestic to Canada in accord with her long-standing status of full nationhood. Two events are the highlights of this process; (i) The termination of appeals from Canadian courts to the Judicial Committee of the Privy Council at Westminster, and (ii) A Constitutional conference of federal and provincial governments concerned to devise an agreed domestic amending procedure for the constitution in all its aspects. Delay in recent years in tackling these problems has been primarily due to the inability of Canadians to agree among themselves.

The question of abolishing appeals to the Privy Council has been raised periodically since 1925. A statute of the federal parliament in 1933 forbade petitions and appeals to London in criminal cases, and the Judicial Committee held the prohibition valid under the undoubted federal power over criminal law. *British Coal Corporation v. The King* [1935] A.C. 500. However, the appeal still lay in civil and constitutional matters and abolition in these respects was before the federal parliament on the outbreak of the recent World War. The

[7] Current Legal Problems, 1950, p. 9.
[8] (1912) 15 C.L.R. 182, 235.
[9] See Sawer, p. 25.
[10] Law Journal, Vol. C, p. 314. (June 9, 1950.)
[11] Current Legal Problems, 1950, p. 4.

ssue was shelved during that conflict to avoid even the appearance of disunity n the face of common enemies, but was revived quickly after 1945. A draft bolition statute was submitted for an advisory opinion to the Supreme Court of anada and then taken to the Judicial Committee on appeal. Their Lordships eld that the joint effect of the Statute of Westminster, 1931, and Section 101 of he British North America Act (which gives the federal parliament power to onstitute "A General Court of Appeal for Canada") was to confer on the federal arliament plenary power to terminate appeals in all civil and constitutional natters as well as in criminal cases. *A.G. for Ontario v. A.G. for Canada* [1947] .C. 500. Hence, late in 1949, a bill was passed at Ottawa which, in the words f the Minister of Justice, vests in the Supreme Court of Canada "exclusive, ltimate, appellate civil and criminal jurisdiction within and for Canada by bolishing appeals to the Privy Council and by making the judgment of the upreme Court final and conclusive in all cases." This statute became effective n December 31, 1949. At the same time the number of Supreme Court justices vas increased from seven to nine.

It is notable that parliament was silent on the principles of precedent that re to obtain in Canada's highest court, supreme now in law as well as name. his matter then rests with the justices themselves in accord with the traditions f the King's courts. Unlike the House of Lords neither the Supreme Court f Canada nor the Privy Council have in the past held themselves absolutely ound to follow respectively their own previous decisions. Nevertheless the radition or custom of so doing is natural and strong, and the prediction may be isked that in the new situation clear-cut Supreme Court departures from the ccumulated body of Privy Council decisions will be rare. None the less the ight to depart in strong circumstances may well be quickly asserted. Future levelopments in this respect are awaited with great interest in Canada.

The second major development concerns the work of the Constitutional Conerence of Federal and Provincial Governments held in Ottawa, January 10-12, 950, at which notable progress was made in evolving domestic constitutional mendment procedures. In 1867 when the B.N.A. Act was passed, the ll-pervading supremacy of the Imperial Parliament was so unquestioned that o domestic amendment procedure was deemed necessary, and hence none was ncorporated in the statute. When changes in the B.N.A. Act were desired, hey were forthcoming by action of the Imperial Parliament in response to a oint address from both Houses of the Canadian Parliament. It has become stablished custom for the British Parliament automatically to enact the precise mendment specified in the address. However, the provinces, while frequently onsulted by Ottawa, have had no assured part or influence in this process. Consequently, the situation in the event of strong provincial dissents has been nd remains obscure, with corresponding possibilities of acute embarrassment or Westminster.

This situation was given point by the B.N.A. Act (No. 2) of 1949, which he Canadian Government obtained from the British Parliament by the above rocedure without seeking the prior consent of the Provinces. It provided for mendment by ordinary statute of the Canadian Parliament of "The Constitution f Canada" with the exception of the subjects of legislative power assigned xclusively to the provinces and certain other parts of the present B.N.A. Act, amely the provisions guaranteeing use of the English and French languages nd those requiring a parliamentary session once a year and elections at least once n five years. Since 1867 it is true that the provinces have had an apparently imilar power to amend their respective provincial constitutions by simple statute, xcept as regards the office of lieutenant-governor, and the Prime Minister, Mr. t. Laurent, asserted that the only purpose of the B.N.A. Act (No. 2) 1949, was o place the Canadian Parliament in the same position regarding purely federal natters. However, the prime ministers of the provinces protested vigorously at he opening of the above-mentioned conference, pointing out that the terms of

this new amendment would allow the federal parliament, among other things, to alter the composition of the Senate or disturb the principles of representation by population in the House of Commons by unilateral action. Such things they said certainly did concern the provinces vitally, and it was clear that unless the federal representatives gave some assurance that they would not insist on the position created by the new amendment, the conference was doomed. Mr. St. Laurent did give the necessary assurance—to the effect that if general over-all amending procedures could be agreed by the conference, the federal power granted by the 1949 amendment would be *ipso facto* subject to re-definition and could be limited to its true intent by more precise terms. From this point on rapid progress was made.

The conference unanimously agreed that purely domestic amending procedures were needed forthwith in accord with the country's status of nationhood. On the recommendation of a committee of legal experts, the conference approved without dissent the following scheme: The provisions of the B.N.A. Acts, 1867-1949, and of other constitutional acts are to be grouped and dealt with for purposes of amendment under six heads:

(1) Provisions which concern the federal parliament only: to be subject to amendment by ordinary statute of that parliament.

(2) Provisions which concern the provincial legislatures only: to be subject to amendment by ordinary statute of such legislatures.

(3) Provisions which concern the federal parliament and one or more but not all of the provincial legislatures: to be subject to amendment by concurrent statutes of parliament and of the legislature or legislatures concerned.

(4) Provisions which concern the federal parliament and all the provincial legislatures; to be subject to amendment by a statute of the federal parliament and by statutes of such majority of the legislatures and upon such additional conditions, if any, as may be decided upon. (Here the consent of parliament and of something like seven out of ten legislatures is contemplated.)

(5) Provisions concerning fundamental rights (e.g. official languages and control of education) and the alteration of the amending procedures; to be subject to amendment only by statutes of the federal parliament and of all ten provincial legislatures.

(6) Provisions which should be repealed.

Amendments in categories (3) to (6) inclusive could be initiated by either the federal parliament or the legislature of a province.

Having progressed to this point, the conference then set up a continuing committee representative of all governments under the Minister of Justice for Canada as chairman. This committee was given the task of attempting an agreed classification of each section of the B.N.A. Acts, 1867-1949, according to the foregoing categories. The various governments were to submit their views to the committee. The conference was then adjourned until September, 1950, when it was expected that the continuing committee would be ready to report. This committee did meet on August 21 and succeeding days, and has claimed to be making good progress without revealing any details. This is encouraging, but obviously the task of reaching an agreed classification for each subject of federal and provincial power is the most delicate feature in the whole negotiation. Without agreement in this respect the procedures agreed in January will be bones without flesh. If too many powers are allotted to the specially entrenched category (5) where alteration requires unanimity, the constitution will be rendered so rigid that little will really have been achieved. For instance, if the whole of the present provincial power over property and civil rights is specially entrenched, the possibility of federal standards in many labour and trade matters of national scope will become remote indeed. Great issues then still hang in the balance and the whole project can yet founder on these rocks of classification.

The conference also addressed itself to another problem, that of inter-governmental delegation of powers within Canada. The question is whether

agency in the exercise of legislative power is permissible under a federal constitution. For example, could the three prairie provinces each delegate to the federal parliament their powers over the production and marketing of eggs so that a comprehensive national marketing scheme would be possible? This differs from amendment since what authority the principal gives can always be revoked. Several provincial courts of appeal have held that such delegation is incompatible with federalism and therefore is unconstitutional. The latest decision to this effect is that of the Nova Scotia Supreme Court *en banc* (*re.:* Bill No. 136 of the Nova Scotia Legislature—[1948]—4 D.L.R. 1). This case has just been argued before the Supreme Court of Canada, which has not hitherto considered the point squarely, and its decision is being awaited. In any event, if the Supreme Court rules against delegation of legislative powers, the proceedings of the constitutional conference of January last indicate that there will be a strong movement to reverse the effect of such a decision by an appropriate constitutional amendment. An element of much needed flexibility would thereby be assured for Canada's federal system.

It is clear then that these are fateful days for constitutional development in Canada.

COMMONWEALTH OF AUSTRALIA

[*Contributed by* Z. Cowen, Esq.]

1. The Bank Nationalization Case.—On October 26, 1949, Lord Porter delivered the judgment of the Judicial Committee of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales*,[1] the Australian Bank Nationalization case. The hearing of the appeal occupied thirty-six days between March 14 and June 1, 1949. This was a record for length of time, as is stated in the report at [1950] A.C. 235, where the argument of the legion of counsel is elaborately set out in nearly fifty pages, while the judgment of their Lordships occupies only half that space. The curious feature of the case was that the original application for special leave to appeal from the judgment of the High Court was granted by the Judicial Committee on the footing that at the hearing of the appeal, the right should be reserved to the respondents to raise the preliminary plea that such an appeal did not lie without the certificate of the High Court, as required by s. 74 of the Commonwealth Constitution. On appeal the respondents were upheld in the argument that this was a case falling within s. 74, and that an appeal was not competent without a certificate of the High Court. With the greatest respect, it is submitted that the course adopted by the Judicial Committee in these proceedings was inappropriate. The preliminary point of jurisdiction to hear the appeal should have been decided on the original application for leave. This would have been more consistent with the purpose of s. 74, and would have avoided great waste of time and expense. It is not proposed to discuss the judgment of the Judicial Committee here; the antecedents of the Banking legislation, the decision of the High Court and of the Judicial Committee are discussed by Professor Sawer elsewhere in this Journal.[2]

2. Proposed Amendment to the Constitution.—An amendment to the Constitution of the Commonwealth (the normal amendment procedure is prescribed in s. 128 of the Constitution) was proposed by the Prime Minister, Mr. R. G. Menzies, in introducing the Constitution Alteration (Avoidance of Double Dissolution Deadlocks) Bill in May, 1950. S. 57 of the Constitution provides that if the House of Representatives passes any proposed law and the Senate rejects or fails to pass it or passes it with amendments unacceptable to the lower House, and if after three months in either the same or the next session the Bill is again passed by the House of Representatives and again fails to pass

[1] [1950] A.C. 235.
[2] See pp. 17.

in the Senate in appropriate form, the Governor-General may (subject to certain time limits) order a simultaneous dissolution of both Houses. If after such a dissolution, the deadlock persists, the Governor-General may convene a joint sitting of the members of both Houses. If at the joint sitting, the proposed law with or without amendments is carried by an absolute majority of the total members of both Houses, it is to be taken to be duly passed and presented for the Royal Assent.

The Prime Minister in introducing the Bill pointed out that as the Senate was at present constituted and elected (by legislation of 1948 there are ten senators for each of the six states, making sixty in all, elected under a system of proportional representation) it was highly probable that a simultaneous election of the House of Representatives and the whole Senate which produced a clear majority for one party in the lower House would return the parties at precisely equal strength in the Senate (i.e. thirty all). This would not necessarily prevent the particular bill which had led to the double dissolution from being passed at the joint sitting, because of the majority in the lower House, but the joint sitting procedure applied only to that measure. This meant that further deadlocks were likely, as an equal vote in the Senate produced a negative division. It was proposed therefore to amend the Constitution by providing that in the event of a dissolution of the Senate, the ten representatives from each state should be elected in two groups—five for a six- and five for a three-year term—in two separate concurrent ballots. Under the proportional representation system, it was inevitable that one side must win three out of five seats in each contest. While this would not entirely avoid the possibility of deadlock, it made it much less likely. To obtain the desired result it was necessary to ensure that the number of senators for any state should on a division into the two electoral groups yield an odd number in each group—if not, the old evil would recur. To achieve this, Mr. Menzies proposed a provision which must be unique in constitutional history.

"The number of Senators for a State (whether an original or a new State) shall be a number which is divisible by two without remainder but is not divisible by four without remainder."

The proposed bill was carried in the House of Representatives over an Opposition amendment to refer the question to an appropriate authority including members of the government and opposition to suggest means by which the present method of resolving deadlocks might be improved. In the Senate, where the Government is in a minority, the Bill was referred to a Select Committee which is to report by September, 1950.

3. The Communist Party Dissolution Bill.—This measure which was introduced in the House of Representatives by the Prime Minister, Mr. Menzies on April 27, 1950, is of far-reaching importance in relation to civil liberties. It has provoked great controversy within Australia.

The Bill as drafted declared the Australian Communist Party to be unlawful, dissolved it, and appointed a receiver of its property. Any surplus over liabilities was to be paid to the Commonwealth. The Bill also dealt with affiliated associations or bodies controlled by Communists, excluding trade unions. Where the Governor-General was satisfied that the continued existence of such a body was prejudicial to the defence or to the maintenance and execution of the Constitution, laws or existence of the Commonwealth, he might declare it unlawful and appoint a receiver of its property. Any declared body, other than the Communist Party, might appeal to the High Court, but the onus of proof was placed on that body to satisfy the Court that it was *not* one to which the legislation applied. Officers and members of unlawful associations were to cease their activities as such and were not, under penalty, to seek support for any such association. Where the Governor-General was satisfied that after May, 1948, the date on which the constitution of the Communist Party had been adopted, and before the dissolution of the association, a person was a member or officer thereof and that

such person's activities prejudiced the defence, laws or constitution of the Commonwealth, he might publish a declaration accordingly. A person might appeal to the High Court against a declaration but the onus of disproof lay on him. The consequence of declaration was disqualification from employment by the Commonwealth or by a Commonwealth authority. If the Governor-General were satisfied that a substantial number of members of an industrial organization were engaged in certain key industries or industries vital to the security of Australia, he might declare that organization accordingly. While this did not impose any disability on the organization, a person who had been declared as above was disqualified from office in any such organization. The purpose here was to debar Communists from holding office under the Crown or in organizations whose activities were vital to the security of the country. Mr. Menzies stated that the constitutional warrant for the legislation was the defence power of the Commonwealth.[3]

As already noted, the Bill evoked bitter controversy. The opposition made its strongest attacks on the provisions placing the onus of disproof on declared organizations and persons. The Bill was read a third time in the House of Representatives on May 23. On June 6, Mr. Menzies announced that the Government would propose important amendments to the bill in the Senate where the Government is in a minority and would welcome a conference with the opposition to secure its passage. The proposed amendments included provisions placing on the Crown the onus of proof of the guilt of a declared person appealing against a declaration, if such person first gave evidence on oath. The Governor-General might repeal the Bill by proclamation when he was satisfied that it was no longer necessary for the safety of the realm. Before the declaration of any person or organization, the material facts were to be considered by a committee including the Solicitor-General, the Secretary of the Defence Department and the Director-General of the Security Service. Further, the only individuals who might be declared were those who, within the dates mentioned in the Bill, were or are officers or members of the Australian Communist Party or Communists.

These amendments were not regarded as sufficient by the Labour majority in the Senate who insisted on further amendments relating to the onus of proof, the right to trial by jury and additional safeguards by way of appeal. The Senate amendments were rejected by the House of Representatives on June 20, and the government amendments substituted. This is the stage presently reached in the progress of the Bill, as Parliament rose on June 23, and further consideration has not at the time of writing been given to the measure.

4. Victoria : Refusal of Dissolution by the Governor. —The English general election of 1950 which gave the Labour Party a very slender majority in the House of Commons raised afresh discussions of the royal prerogative of dissolution.[4] The problem is whether and in what circumstances the King (or his representatives in the Commonwealth) may decline to grant a dissolution on ministerial advice. The subject has been elaborately discussed in recent years, notably by Evatt in *The King and His Dominion Governors* (1936) and by Forsey in *The Royal Power of Dissolution of Parliament in the British Commonwealth* (1943). There are two comparatively recent and important Dominion precedents. In Canada in 1926, Lord Byng refused a dissolution to Mr. King and within a few days granted one to Mr. Meighen who had undertaken to form a govern-

[3] The principal provision in the Constitution giving the Commonwealth Parliament legislative powers with respect to defence is s. 51 (vi) which provides that the Parliament, subject to the Constitution has power to make laws for the peace, order and good government of the Commonwealth with respect to "the naval and military defence of the Commonwealth and the several States and the control of the forces to execute and maintain the laws of the Commonwealth." Since the decision in *Farey v. Burvett* (1916) 21 Commonwealth L.R. 433, this power has been given liberal judicial construction in the two World Wars and subsequently.

[4] See *The Times*, April 24, 1950, p. 5; April 26, p. 7; April 27, p. 7; May 2, p. 5.

ment on Mr. King's resignation which followed the refusal of the dissolution. The constitutionality of this action on the part of the Governor-General has been disputed. Evatt maintains that Lord Byng's error lay in granting a dissolution to Mr. Meighen after refusing it to Mr. King.[5] Forsey subjects the case to an elaborate and detailed analysis and contends that Lord Byng's conduct was correct throughout.[6] In 1939, Sir Patrick Duncan, Governor-General of South Africa refused a dissolution to General Hertzog who thereupon resigned. General Smuts then formed a government and carried on with the existing parliament without difficulty. The issue in South Africa arose out of the question of neutrality in 1939. Smuts was a member of Hertzog's cabinet which was itself divided. Hertzog and a minority in the Cabinet favoured neutrality, Smuts and a majority were for participation without the dispatch of troops overseas. A majority in the House had favoured Smuts's policy and it was at this point that Hertzog asked for a dissolution. There are, in addition, a number of other Commonwealth precedents for refusal of a dissolution.[7]

A further case has now arisen in Victoria. At the general election in May, 1950, the parties were returned with the following strengths in the Legislative Assembly (Lower House); Liberals 28, Labour 25, Country Party 12. In the old House the strength had been Liberals 30, Labour 17, Country Party 16, Independents (formerly Liberals) 2. In November, 1947, a Liberal-Country Party coalition had assumed office under the Liberal leader, Mr. Hollway. The Country Party seceded from the coalition in December, 1948. After the 1950 election, the Hollway Government was decisively defeated by the full vote of the Labour and Country Party members on a vote of no confidence moved by the Country Party leader, Mr. MacDonald, in the Legislative Assembly. Mr. Hollway then requested a dissolution, which was refused by the Governor. He thereupon resigned and Mr. McDonald was commissioned to form a new Government.

At the time of writing it may be stated tentatively that this appears to have been a justifiable exercise of his discretion by the Governor. A general election had just taken place. At that election the Liberals had lost some ground. The vote of no confidence was carried decisively by both opposition parties. Although no single party can command an absolute majority in the House, the governor may reasonably have assumed that an alternative government was in a position to carry on the administration of the State.

NOTES ON SOUTH AFRICAN CONSTITUTIONAL LAW

[*Contributed by* Ellison Kahn, Esq.]

THE CROWN AND THE EXECUTIVE

(a) Contract.—In *Nicol, N.O. v. Lawrie,* 1950 (3) S.A.L.R. 151 (A.D.), an architect who had entered into a five-year contract of employment with the Provincial Secretary of the Transvaal, duly authorized by the Provincial Administration, sued the Administrator of the Transvaal in his official capacity for damages for wrongful dismissal. The defendant cited Halsbury (2nd ed., vol. 6, sec. 601) as authority for the proposition that in the absence of special statutory provisions, all service contracts under the Crown are terminable by it without notice, even though there be an express term in the contract to the contrary, the reason being the Crown's inability to deprive itself of its powers of dismissing a servant at will—which might itself be only part of a wider principle, that the Crown cannot fetter its future executive action. Since the extent of the prerogative in South Africa, save for statutory modification, is the same as in the United Kingdom (for the latest affirmation see van den Heever, J. A., in *Sachs v. Dönges, N.O.,* 1950 (2) S.A.L.R. 265 (A.D.) at 309), it is unfortunate that the Appellate Division, because of a statutory modification in the

[5] *op. cit.* pp. 55, 62.
[6] *op. cit.* pp. 131-250. See also Lawson, 61 E.H.R., 411-2.
[7] See Evatt, *op. cit.,* passim; Forsey *op. cit.* passim.

nstant case, found it unnecessary to decide whether the statement in Halsbury was a correct reflection of the law. The Court held that, having regard to the Crown Liabilities Act, No. 1 of 1910, which binds the Crown in any "contract lawfully entered into" on its behalf, and the terms of section 16 the Public Service and Pensions Act, No. 27 of 1923, the Crown was liable in the case under review. There are dicta however, in both this case and *Sachs v. Dönges, N.O.* (*supra*), which show that certain Judges of Appeal have grave doubts about the correctness of the statement in Halsbury.

(b) Delict.—The Crown Liabilities Act, No. 1 of 1910, renders the Crown liable for wrongful acts committed by its servants acting within the scope of their authority. A long line of cases has laid down, however, that the Crown is not liable if the servant was carrying out a duty imposed on him by law, whether by statute or common law, in the performance of which he exercises a personal discretion and is independent of Crown control exercised through the orders of superiors. In the recent case of *Sibiya v. Swart, N.O.*, 1950 (2) S.A.L.R. 752 (T.P.D.), the plaintiff had been assaulted by a police-officer after the latter had lawfully arrested him, and while, in pursuance of a statutory duty (section 33 of the Criminal Procedure and Evidence Act, No. 31 of 1917) he was taking the plaintiff to a charge office. The Crown was held not liable, following the analogous case of *B.S.A. Co. v. Crickmore,* 1921 A.D. 107. No doubt the Court's decision was sound in the sense that it followed earlier, binding authority. But the doubt still remains whether it is correct and equitable that our courts should continue to transfer from the realm of private to public law, the theory of vicarious liability of a master for his servant's wrongs resting on the right of control of the manner in which the alleged servant is to do the work. Indeed, adverse comment has not been wanting in certain aspects of the application of the theory in private law: thus the hospital—doctor—nurse cases. When it comes to public law, it does seem that wrongful arrest by a policeman (*Crickmore's* case (*supra*)), wrongful detention through failure of a magistrate to carry out an administrative duty to release a person after a *nolle prosequi* decision of the Attorney-General (*Swarts v. Minister of Justice,* 1941 A.D. 181) and similar cases should ground an action against the Crown, and not go off on a refined theory of vicarious responsibility. The damage produced by such wrongs should surely fall on the community as a whole as one of the inevitable costs of social life. It may indeed be doubted whether the legislature in passing the Crown Liabilities Act ever intended to give the subject so restricted a right of action as the courts have made out. The tests have become inveterate however, and no hope can be entertained that the Appelate Division will retrace its steps. Only Parliament can afford relief, and there are two factors that should be brought to its attention: firstly, that the Government often stands good in practice for the public officer against whom judgment has been given personally; secondly, that under the Crown Proceedings Act, 1947, of the United Kingdom, the Crown is liable for the acts of its servants in carrying out a function conferred or imposed by law, as if that function had been conferred or imposed solely by lawful instructions of the Crown (section 2(3)). (True, liability for acts done in a judicial capacity and for acts of police-officers is entirely excluded (section 2(5) and (6)); there is much to be said for the former exlusion, but it is suggested that the latter exclusion would be unfortunate in South Africa.)

Passports and the Prerogative.—Two recent cases relating particularly to prerogative rights in relation to a passport, were decided by the Appellate Division. In view of the apparent absence of any other decision in the Commonwealth on the question, and the fact that (apart from statutory modifications) the prerogative is the same in South Africa as in the United Kingdom, these two cases are worthy of more than just passing consideration.

In *Sachs v. Dönges, N.O.*, 1950 (2) S.A.L.R. 265, the Minister of the Interior claimed that the Crown had a common law right, flowing from the prerogative, to cancel a passport it had issued, and asked accordingly for an order of court

requiring the respondent to produce his passport for cancellation. The passport was in the then ordinary form: it expressed to be valid for five years; it set out specially one ground (mutilation or unauthorized alteration of the document) entitling the Executive to cancel it, but did not state that it was recoverable at the Executive's discretion, nor that it was the property of the State. A fee of £1 was charged for its issue. By a majority of three to two, the Appellate Division held that the Minister was not entitled to the order claimed. In doing so it overruled the judgment of the court *a quo*, and several earlier decisions of provincial divisions, to the contrary effect.

Watermeyer, C. J., concluded that "from a juristic point of view the grant of a passport is a contract." He rejected the contention that if it was a contract it could be freely revoked by the Crown, on the analogy of the Crown's right to dismiss its servants at pleasure, and its inability to fetter its future executive action (*Rederiaktiebolaget Amphitrite v. The King*, [1921] 3 K.B. 500). The learned Chief Justice was not at all certain that the right to dismiss a Crown servant at will was as extensive in Britain as was commonly made out; he was very doubtful whether since the Crown Liabilities Act, 1910, it existed in the Union at all. But even on the assumption that it did, it did not follow that "the Crown can at will revoke an executive act such as the grant of a passport." For according to the cases the Crown servant was in a special position, his service either not being on a contractual basis at all, or if it was, the contract contained an implied term which could not be eliminated, viz. that it was revocable at the will of the Executive. Other Crown contracts, as for instance the grant of a passport, bound the Crown, unless the "King has been deceived in his grant." Finally, the Chief Justice rejected the contention that the revocation of a passport fell within the purview of an Act of State.

Greenberg, J. A., the second of the majority judges, followed a somewhat different line from the Chief Justice. He compared the issuing of a passport to the granting of a letter of recommendation by a private individual to a former employee; in this case the grantor could not, without assigning some valid reason, invoke the aid of the courts to obtain return of the document. As to the Crown's right to dismiss servants at will, if it came from the prerogative at all, it was a result of public policy requiring that the Crown have such extensive right. "These considerations do not apply to the same extent, if, they apply at all, to the tenure of a passport." In the event he held that the Minister failed to show a claim valid at law for the order he applied for.

The third majority judge, Schreiner, J. A., in concurring made some striking remarks about prerogative powers generally, stressing that they did "not form an almost mystical field in which the executive is free not only to do whatever it wills, but also to undo whatever it has done."

The two minority judgments may be preferred by some. Centlivres, J. A., rejected the view that the grant of a passport was of a contractual nature. It was a prerogative act arising out of the Crown's conduct of foreign affairs. The Crown has the right to refuse to issue a passport without assigning any reason. "It follows that the Crown has the right to cancel a passport . . . To hold that the Crown cannot cancel a passport would seriously and unjustifiably hamper the Crown in its conduct of foreign affairs" (at p. 301). Further, it was not for the Court to enquire into the reasons for cancellation, for then it would concern itself with "political or semi-political questions."

Van den Heever, J. A., the other minority judge, also held that the grant was not of a contractual nature. He drew a distinction between prerogative grants which were not revocable at pleasure—"dispositive acts of the Crown alienating possessions corporeal [and] incorporeal"—and other prerogative acts which the Executive was entitled to reverse, in virtue of their discretionary nature. One of these acts was the issuing of a passport. The learned judge also drew attention to the potential prejudice that would result to the State if the Executive were held not to be entitled to revoke a passport.

In view of the decision in *Sachs'* case, there could only be one result in the econd passport appeal, *Dönges, N.O. v. Dadoo,* 1950 (2) S.A.L.R. 321 (A.D.). Iere an order was sought compelling the Minister to return a passport which ad been seized from the holder by a Crown servant through a subterfuge. The ppellate Division held that the order had rightly been granted by the court *quo*. It is noteworthy, however, that van den Heever, J. A., showed that the ame conclusion could be reached without reference to *Sachs'* case, on the general rinciple that a writ of spoliation lay to prevent anyone being dispossessed ithout legal process, even by someone who would be entitled to a judicial ecree ordering delivery of the property in question to him. This is of importance n view of the new type of passport under consideration at the time of writing. he government will not be able to seize a passport which the holder refuses o surrender, even though it expresses to be revocable at the discretion of the xecutive, and to be the property of the State. Legislation is the only route ne government will be able to follow, if it desires to secure immediate possession.

Enlargement of the Ministry.—The number of Ministers in the Union has been ncreased from twelve to fourteen by the South Africa Act Amendment Act, No. 9 of 1950, which amends section 14 of the South Africa Act accordingly. The abinet is still composed of the whole Ministry, and there are no junior Ministers, espite considerable support for their creation of late years.

The enlargement of the Ministry appears to be amply justified. At Union here were ten Ministers; an additional post was created in 1925, and a further dditional one in 1938. Meantime, as the Prime Minister pointed out in the ower House (*House of Assembly Debates,* June 20, 1950, cols. 9592f), the nembership of both Houses of Parliament has increased considerably (the House f Assembly from 121 to 153 members), and there has been a great expansion in ne membership of the public service and in the activities and expenditure f the State. The Parliamentary session is now almost five months long, com- ared with three months in the immediate years after Union.

Even with its additional members the Ministry appears to be the smallest n the Commonwealth. But the effectualness of a Ministry does not vary in irect proportion to its size, as any reader of Dawson's *The Government of anada* will know. Possibly the Prime Minister will take the opportunity of ppointing a member of the Cabinet from the Senate, which at present is not epresented, a circumstance which neither facilitates Government business in, or adds to the waning prestige of, that House.

THE JUDICIARY

The End of the Appeal to the Privy Council.—A hardening of opinion against ne right of appeal from the Appellate Division to the Judicial Committee of the rivy Council became noticeable in the Union after 1933, when the Judicial ommittee gave leave to appeal from the decision of the Appellate Division in earl Assurance Co. Ltd. v. Union Government, 1933 A.D. 277. Since Lord aldane's speeches in *Whittaker v. Durban Corporation,* [1920] 36 T.L.R. 784, nd *Hull v. McKenna,* [1926] I.R. 402, it had been understood that leave to ppeal would be granted by the Judicial Committee in civil matters only on "a reat constitutional question or question of law . . . in the case of South frica . . . the practice [having] become very strict." In the following years a umber of applications to the Judicial Committee for special leave to appeal ailed. Leave was given in *R. v. Ndobe,* 1930 A.D. 484, since the case dealt ith a very important constitutional issue arising out of the Cape Native ranchise, and no objection was levelled at the granting of the application. ince, however, the appeal was abandoned, apparently owing to lack of funds, eight was lent to one ground of objection to the appeal, viz. expense.

Three years later, however, the decision to grant leave to appeal in the *earl Assurance* case on the question of penalty and liquidated damages in ontract, showed that too much reliance had been placed on Lord Haldane's

dicta in the past, and that there was much in the criticism that the Privy Council appeal in practice could be extended to matters of private law for which it was quite unsuitable. This criticism was sharpened when the decision of the Judicial Committee in the appeal itself was given. *Pearl Assurance Co. Ltd. v. Union Government,* [1934] A.C. 570; 1934 A.D. 560. It overruled the judgment of four members of the Appellate Division on what was a pure question of Roman-Dutch law. The stinging reception which the speech of Lord Tomlin received in certain quarters is well illustrated by the following passage from an article by a learned judge, who is now a member of the Appellate Division (see "Immorality and Illegality in Contract," 60 (1943) *S.A.L.J.* at 476; the identity of the author, who chose the pseudonym "Aquilius," is an open secret). After criticising the judgment as an entirely incorrect assessment of the Roman-Dutch law on the question, the writer says:

> "To expound a system of law in which one was nurtured is anxious and exacting labour, a field of endeavour in which a life-time is all too short. It is no reflection on the members of the Judicial Committee, therefore, to say that neither in the past nor in the case under consideration have they been happy in the application of a system of law with which they were not even on a footing of nodding acquaintance. Not that they are to blame, but a ridiculous arrangement which charges them with an impossible task."

Nor is the *Pearl Assurance* case the only one in which a Privy Council decision has been condemned as being inconsistent with the principles of Roman-Dutch law. Thus, for instance, *Galliers v. Rycroft,* [1901] A.C. 130, was adversely commented upon in *Estate Welsford v. Estate Wright,* 1930 O.P.D. 162, and in *Ex parte Wessels,* 1949 (2) S.A.L.R. 99 (O.P.D.). Indeed, the Minister of Justice has stated that he hopes to be able to secure a statutory change to reflect the true common law doctrine (*House of Assembly Debates,* February 8, 1950, cols. 922-3). Another example is the criticism by the Appellate Division in *McCullogh v. Fernwood Estate Ltd.,* 1920 A.D. 204 at 208,217, of the Privy Council decision in *Natal Land and Colonization Co. Ltd. v. Pauline Colliery and Development Syndicate Ltd.,* [1904] A.C. 120. Further illustrations are given by Mr. R. S. Welsh in an interesting recent article in the *South African Law Journal,* (67 (1950) *S.A.L.J.* 227).

The burden of the first ground of the "abolitionists" may thus be said to have been the inevitably unsatisfactory nature of many decisions of the Privy Council, given by men unlearned in the difficult discipline of the Roman-Dutch law. Allied to this was the growing belief that the existence of the appeal was an unfair *capitis deminutio* imposed on our Appellate Division. Another major ground was that the existence of the appeal was inconsistent with the sovereign independent status of the Union. Finally, there was the question of expense to litigants mentioned above.

On several occasions in the last two decades efforts were made in Parliament by the Opposition to secure the abolition of the appeal. On each occasion, however, the Government considered that in view of the sentimental attachment of certain sections of the population to this right of appeal, "the time was not ripe" to put an end to it. The present Minister of Justice was one of the keenest protagonists of abolition when a member of the Opposition, and it occasioned no surprise when he introduced the Privy Council Appeals Bill this session.

The Bill, in terms of which section 106 of the South Africa Act was to be replaced by a new section stating that there was to be no appeal in future to the King-in-Council from any judgment or order of any court in the Union of South Africa or South-West Africa, met with very little opposition in either House, apart from certain representatives of the Natives, and has now become law. (Privy Council Appeals Act, No. 16 of 1950.)

One question remains uncertain, however, and that is the present state of the *stare decisis* doctrine. In the past our courts have considered themselves bound

y a Privy Council judgment on a question of Roman-Dutch law, at least rovided the relevant authorities were brought to the notice of the Board *McCullogh v. Fernwood Estate Ltd.* (*supra*)). In addition, our courts have eemed themselves bound in interpreting a South African statute, to follow the udicial Committee's interpretation of an identical foreign statute, provided here is nothing in our common law to require a different interpretation (*Estate Vege v. Strauss*, 1932 A.D. 76 at 80-1). During the passage of the Bill in Parliament, the Minister accepted an amendment moved in the lower House to he effect that the Appellate Division would not be bound to follow a Privy Council decision (see *House of Assembly Debates*, February 8, 1950, col. 929 nd February 9, col. 973); but in the Senate wiser counsels prevailed, and the lause was deleted on the ground that it would rather add to than settle the ncertainty of the position, and that the matter would have to be left to the udges. All that can be said is that in future the Appellate Division will probably egard a Privy Council judgment in the same light as one of its own, i.e. will eel free to depart from it if convinced it is wrong (*Commissioner of Inland Revenue v. Estate Crewe*, 1943 A.D. 656 at 680). It must be borne in mind, owever, that recently the Appellate Division indicated that it would be reluctant o disturb what for a long period has been thought to be the law, albeit wrongly, articularly if dispositions have been made on the strength of it and property ights grown up under it (see *The Mine Workers' Union v. Prinsloo*, 1948 (3) .A.L.R. 831 (A.D.) at 852). As regards Southern Rhodesia, since the Privy Council appeal remains, the Appellate Division will no doubt continue to egard Privy Council decisions binding as in the past.

PROVINCIAL COUNCILS

Rights of Speech in the Transvaal Provincial Council.—In October, 1949, the Transvaal Provincial Council without notice and by a majority vote passed guillotine motion. Its Standing Rules provided that every member was ntitled to speak before the reply was made. (Where the Chairman was pre-iding there was a limitation imposed on the length of certain speeches). Standing Rule No. 168, which had been in existence since 1919, stated that *"in all cases not provided for"* in the rules of the Provincial Council resort would ave to be made to the rules and practice of the House of Assembly *"as far as hey can be applied,"* and save that no *"closure motion"* was permissible. Twenty-four hours' notice was required for a motion to suspend the Standing Rules. The guillotine was first introduced in the House of Assembly in 1940.

Application was made by five Provincial Councillors for *inter alia* a eclaration that the guillotine motion passed by the Provincial Council was nvalid. (*De Kock v. Terblanche*, 1950 (1) S.A.L.R. 87 (T.P.D.)) Roper, J., eld that although the words "closure motion" in Standing Rule No. 168 could ot refer to the guillotine as such, which came into existence in the House of Assembly long after the Rule was passed, nevertheless applicants were entitled o the order claimed on two grounds: Firstly, that Rule No. 168 did not permit esort to "any rule or practice which might be adopted in future by the House of Assembly having the effect of the closure even though in a somewhat different orm"; and secondly, that the words of the Rule above italicised excluded the doption of a rule or practice of the House of Assembly which was inconsistent vith an existing rule of the Provincial Council, which was the case here, where he guillotine would be inconsistent with the Provincial Council rules relating to he rights of speech. The learned Judge further rejected the contention of espondent (the Chairman of the Provincial Council) that the Council was entitled o adopt the resolution of the majority even though it thereby overrode its own ule requiring twenty-four hours' notice of motion. On the latter point Roper, J., ade the following instructive remarks (at p. 100):

"A Provincial Council is a controlled legislature; the rules of procedure

which it adopts for the management of its business are subject to the veto of the Governor-General [sec. 75 of the South Africa Act], and it is entitled to depart from them only to the extent and in the manner in which such departure is authorized by its rules, e.g. by the rule providing for the suspension of the Standing Rules."

THE CITIZEN AND THE STATE

Prevention of Racial Hostility.—South African law contains two statutory provisions aiming at preventing the promotion of hostility between the European and coloured races. Under the Native Administration Act, No. 38 of 1927, section 29 (1), it is an offence for a person to utter any words or do anything whatever with intent to promote feelings of hostility between Europeans and Natives. The Riotous Assemblies Act, No. 27 of 1914, as amended by Act No. 19 of 1930, aims rather at "preventive justice." It empowers the Governor-General to prohibit the publication of any documentary information which in his opinion is calculated to engender feelings of hostility between the Europeans on the one hand, and any other section of the inhabitants of the Union on the other hand (section 1 (7)). Any affected person may apply to the Supreme Court to set the prohibition aside, and the Court, if such person proves to its satisfaction that the natural and probable result of the publication of the documentary information will not be to engender such feelings of hostility, may set the prohibition aside (section 1 (9)). Two recent cases have been concerned with these statutory provisions.

R. v. Nkatlo, 1950 (1) S.A.L.R. 26 (C.P.D.), arose out of a prosecution under the Native Administration Act. The Cape Court held that in cases other than those in which the hostile intent of the accused is proved by direct evidence (in the nature of things very rare), the Crown will discharge its onus by invoking the rule that the accused must be presumed to intend the natural and probable consequences of his acts. The Court must be satisfied, however, that the inference of intention to promote hostile feelings is the only reasonable one to be drawn. "To advocate a change of the economic system or of the existing Government," said Herbstein, J., at p. 36, "does not necessarily lead to an inference of [this] intention." This statement must now be read subject to the Suppression of Communism Act, discussed below.

In the second case, *du Plessis v. Minister of Justice,* 1950 (3) S.A.L.R. 579 (W.L.D.), application was brought to set aside an order of prohibition by the Governor-General under the Riotous Assemblies Act. The ban was imposed on a pamphlet which the applicant had published. Written from a Communist viewpoint, the pamphlet sharply criticised the political outlook and legislative programme of the Government. Certain passages were found by the Court to be calculated to arouse resistance to the police in the administration of the pass and liquor laws and to engender feelings of hostility against the Government and its legislation. But de Villiers, J., held that this was not enough to justify the ban. The Act required that the document create feelings of hostility between the European section as a whole, irrespective of political conviction, on the one hand, and the Native or Indian or Coloured group on the other. The Act, he said, made a serious inroad into the rights of the citizen. Freedom of speech and of the subject were corner-stones of the constitution. The Act must therefore be strictly interpreted. The government must expect sharp, even very sharp criticism. Indeed, criticism and judgment of the expressed policy of any political party, whether in power or not, was open to all. In the event the Court set the order of prohibition aside. It may be pointed out, however, that the Government now has power to prohibit the publication of pamphlets of this like under the Suppression of Communism Act.

The Suppression of Communism Act, 1950.—This important Act (No. 44 of 1950) came into force on June 26 this year. It is not possible in a note to do

more than set out its leading principles. "Communism" is given a wide definition as the doctrine of Marxian Socialism as expounded by Lenin or Trotsky, the Comintern of Cominform or any related doctrine, and in particular one which aims at any of the following:

(i) the establishment of despotic government based on the dictatorship of the proletariat, whereby only one political organization is recognized;

(ii) "bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by the threat of such acts or omissions or by means which include the promotion of disturbance or disorder, or such acts or omissions or threats." (The only way in which this vague definition is hedged in is that "legitimate" strikes do not fall within its purview.)

(iii) bringing about any political, industrial, social or economic change in the Union under the direction of any foreign government or institution one of whose purposes is to promote in the Union a system akin to that in operation in a country which has a despotism based on dictatorship of the proletariat;

(iv) the encouragement of hostility between the European and non-European races the results of which are calculated to further the achievement of any object set out in (i) or (ii) above.

A Communist is defined as a self-professed Communist or one deemed to be a Communist by the Governor-General, after a reasonable opportunity has been given to such person to make such representations as he considers necessary. The Courts will hardly be in a position to control the exercise of these discretionary powers (cf. *Sachs v. Minister of Justice*, 1934 A.D. 11, *Schierhout v. Union Government*, 1927 A.D. 94, and *Jeewa v. Dönges, N.O.*, 1950 (3) S.A.L.R. 414 (A.D.)).

It is a criminal offence, punishable by imprisonment up to ten years, to do any act calculated to further, or to advocate, defend or encourage, the achievement of any act calculated to further any of the objects of Communism. (The Act does not expressly specify what these objects are.)

The Communist Party is declared an unlawful organization. The Governor-General is empowered to declare any other body an unlawful organization if he is satisfied that it professes to be for, or has as one of its purposes, the propagation of Communism or engages in activities calculated to further any of the objects of Communism. Before this can be done, the Minister must consider a factual report of a committee of three appointed by himself. After the declaration the Minister must report to Parliament within fourteen days. A registered Trade Union (there are many legal Trade Unions unable to secure registration) can only be declared unlawful if the Governor-General is satisfied that it professes to be an organization for propagating Communism. Again, the Courts in practice will not be able to control the discretionary power of the Governor-General.

The consequences of a declaration that an organization is unlawful are drastic. It is an offence, punishable by imprisonment up to ten years, to take part in any activity connected with it. It is wound up by the State and the surplus funds distributed to charity or to scientific bodies. The liquidator of the organization, appointed by the Minister, may be directed by him to frame a list of past and present members and active supporters and is given wide powers to search without notice, to seize documents and question individuals. No person's name may be put on the list, however, unless he has been given a reasonable opportunity to show that it should not appear on it, and there is provision for removal of the name of a person who thereafter proves it should not appear on the list. Apparently the jurisdiction of the Courts is not affected in the case of the list.

The Minister is given discretionary powers to require a Communist or a present or past member or active supporter of an unlawful organization to

comply with specified directions, among them to resign from a specified organization, or not become a member of a specified organization, not become a member of the civil or local government service or if such a member to cease to be such. The Minister can also require him not to become a member of either House of Parliament or a Provincial Council or any local government institution or if such a member, to cease to be such. In the latter case, however, save in respect of a person who between March 5 and June 26, 1950, professed to be a Communist, the Minister cannot act except after a report of a Committee of the Senate in the case of a Senator and of a Committee of the House of Assembly in other cases. The practical effect is that the solitary Communist member of the lower House may be unseated without enquiry. The tenure of office of the judges and administrators of the provinces will not be affected. The Minister will have to report any action taken to Parliament within 14 days.

Wide powers are vested in the Governor-General, without notice to anyone concerned, to prohibit the printing or publication of any periodical or publication which he is satisfied professes to be for the propagation of Communism, or is directly or indirectly disseminated by an unlawful organization, or which he is satisfied is calculated to further the achievement of any of the objects of Communism. The provisions of section 1 (9) of the Riotous Assemblies Act of 1914, as to the setting aside of the prohibition by the Courts, finds no counterpart in this Act, where the discretion of the Government in practice will be unfettered.

The Minister is empowered to prohibit a gathering or the attendance of a person at a gathering whenever in his opinion there is reason to believe that the achievement of any of the objects of Communism will be furthered by the gathering or the attendance of this person, as the case may be.

The Minister is also given power to order a person to depart from a particular area for a specified period, if he is satisfied that he is advocating, defending or encouraging the achievement of any of the objects of Communism, or doing any act calculated to do so. These provisions broadly correspond with section 1 (12-15) of the Riotous Assemblies Act.

A Communist or a person convicted of one of the major offences under the Act, if an alien may be deemed by the Governor-General to be an undesirable inhabitant, and will then be removed from South Africa.

The Population Registration Act, 1950.—This Act, which can be brought into effect by the government piecemeal, makes provision for the compilation of a register of the Union's population, under which every person is to be classified as a white person, coloured person or a native. In the case of coloured persons and natives, there may be further classification into ethnic groups to be fixed by the Governor-General. A person aggrieved at his own or another's classification, can have his objection considered by a board of three appointed by the Minister, presided over by a judge or magistrate, or former judge or magistrate. The decision is final in the case of objection to another's classification. A person may take an objection to his own classification, however, right up to the Appellate Division.

The register is to set out particulars as to name, sex, place of business, race classification, date and place of birth, citizenship, marital status, and electoral division to which the person in question belongs, and no other particulars. Most of these particulars will be available to the public. Identity cards will be issued to all over the age of 16, bearing certain of the above particulars and a photograph of the holder. Peace officers will be entitled to its production in specified circumstances.

The Group Areas Act, 1950.—In the words of the Minister of the Interior, Dr. T. E. Dönges, K.C., in his second reading speech in the House of Assembly, "the overriding principle" of this Act "is to make provision for the establishment of . . . separate areas for the different racial groups, by compulsion is necessary" (*House of Assembly Debates,* May 29, 1950, cols. 7433-4). These races are the

white, coloured and native groups, though the latter two groups may be subdivided by the Government into further groups. The Act can be brought into effect piecemeal by the Government. Little purpose would be served into going into its very complicated provisions save to say that in effecting its purpose of separate areas for the residence of and for ownership by the different racial groups, the Act makes provision for the compulsory alienation of immovable property owned in a "group area" by a member of a race other than the one for which the area is now allocated. In the case of individuals, such land may not be willed away and must be disposed of by the executor of the deceased estate within a year; company-owned land must be disposed of within ten years. The Act also prohibits the issuing or renewal of trading licences where the proposed holder will have no right of occupation of the premises, i.e. it makes provision for the separation of races in trading.

BRITISH WEST INDIES

[*Contributed by* Z. COWEN, ESQ.]

A FEDERATION of the British West Indian colonies has been under consideration for many years. A Royal Commission recommended a political federation in 1884. For long there was little enthusiasm for the project in the West Indies, and in 1922, Lord Halifax, then Parliamentary Under-Secretary of State for the Colonies, in a report on the West Indies pointed to the insularity of the individual colonies as a formidable barrier to the achievement of federation. The West Indies Royal Commission of 1938-9 stated that the welding of the colonies into a single political unit was the object towards which policy should be directed, but expressed doubt as to whether the time was then ripe for establishing a federation.

During the war years, the West Indian colonies were drawn more closely together both by air communication and by the establishment of regional organizations primarily concerned with the resolution of social and economic questions. In 1945, the Colonial Secretary, Mr. Oliver Stanley, invited the legislatures of the British West Indian colonies and the Bahamas to indicate whether they desired a conference to formulate proposals for federation. All the colonies except the Bahamas assented and in 1947 a conference was held in Jamaica, and was attended by Mr. Creech Jones, then Colonial Secretary. The Conference recommended the establishment of a Standing Closer Association Committee composed of delegates nominated by the legislatures of the individual colonies. The terms of reference of the Committee were to consider and make recommendations on the fiscal, customs and tariff policy of the area, currency and public service unification, and the form of a federal structure which it was deemed desirable to establish, and the means of financing such a federation. The Conference recommended that the structure of the federation should be such as to leave with the member states the residue of power, allocating only specific powers to the central authority.[1] The report of the Committee was published in March, 1950.[2]

The report emphasizes the importance of federation in relation to the economic problems of the area. It is stressed that federation will not of itself solve those problems, but will provide a framework within which their solution may be possible. In any event, it is agreed that they cannot be solved on the present unit basis.[3] In discussing the structure of the proposed federation, it is clear that the delegates were strongly influenced by the form of the Australian con-

[1] For a more detailed account of the events leading up to the Report of the Committee, see Greenidge, "The British Caribbean Federation": World Affairs, July, 1950, pp. 321-4.

[2] Report of the British Caribbean Standing Closer Association Committee, 1948-9. Col. 255 of 1950.

[3] See *The Times*, April 24, 1950, p. 5.

stitution. This is apparent in regard to the distribution of legislative powers, to the provisions for external borrowing which reflect the strong influence of the Australian Loan Council procedure, and also in regard to federal judicial power, where the very words of the Australian Constitution Act were adopted. With respect to the distribution of powers, it is stressed that agriculture, education and public order should be matters of local (i.e. unit) concern, although in certain of these matters the federal government might play a useful part in sponsoring research, dissemination of information, and by providing specialist advice. It is significant that legislative power is reserved to the King-in-Council with respect to defence, the foreign relations of the federation and the performance of its international obligations, and the financial stability of the federation. There is a further reservation of legislative power to the King-in-Council in emergency to secure public safety, order and supplies. The federal authority also retains power in these cases, subject to a supremacy clause under which United Kingdom orders-in-council which are in conflict with federal provisions will prevail. The reason for the reservation of these powers to the United Kingdom government is stated to be the "inescapable responsibilities of His Majesty's Government" in the area.

The emphasis on these responsibilities of the United Kingdom government is again reflected in the financial proposals. Stress is laid on the necessity of continuing grants-in-aid from the Home government. It is proposed that grants-in-aid should, in the first place, be paid to the central government which will in turn allocate sums to the unit Governments. It is considered that this procedure will help to give necessary support to the authority of the central government. It is stressed that the financial support provided by the Home government through such grants and also through loans must not be made contingent upon the exercise by the United Kingdom of a general and indeterminate control over the day-to-day financial and economic affairs of the region, as this would tend to destroy independence. The importance of the freedom of the federal authority from dependence on the units in financial matters is also emphasized. It is proposed that customs and postal revenues should go direct to the central government, subject to the automatic repayment of a fixed proportion to the unit governments during the first five years of federation. At the end of this period of five years it is proposed that there should be an independent inquiry into the financial structure of the federation, including the financial relations between the federation and the unit governments.

It is proposed further that there should be a bicameral legislature. The House of Assembly (for which an allocation of seats is proposed) is to be elected by universal adult suffrage. The Senate is to be nominated by the Governor-General and is to have 21 members (two from each unit except Montserrat with one). The House of Assembly is to elect a Prime Minister. The remainder of the executive (Council of State), which is to be the policy-forming body is to be nominated by the Governor-General who is to appoint seven members of the Legislature on the nomination of the Prime Minister. Six other members are to be nominated to the Council of State by the Governor-General of whom a maximum of three may be officials and the rest members of the Legislature.

The report contains other recommendations with respect to such matters as the public service and steps to be taken prior to federation. The report is to be submitted to the legislatures of the individual colonies. If a sufficient number (which does not yet appear to be prescribed) agree to the proposals, an Act of the United Kingdom Parliament will be required to establish the federation, the proposed title of which is the British Caribbean Confederation. Trinidad is proposed as the seat of government.

It is interesting to note that the proposed federation is contemplated only as a step on the path to full Dominion status. Financial dependence on the Home government is frankly recognized, and important legislative powers are conceded to the United Kingdom government. The tenor of the report indicates

that federation is, however, an indispensable step, without which the economic and the political conditions upon which full Dominion status are predicated are impossible of fulfilment.

What the fate of the proposals will be is not yet clear. A recent commentator has observed that "although federation has much to recommend it, it has many hurdles to surmount before it is likely to be accepted by all the colonies concerned."[4] Space does not permit of a discussion of these, and reference may be made to the article from which the above quotation is taken. The United Kingdom view was stated in the House of Lords on July 4. It was not the government's intention to foist federation on the West Indies or to encourage federation in order to slow down constitutional progress in the largest individual colonies to the pace of the slowest member. At the same time, the government favoured federation of the British Caribbean territories, but the next step was with the local legislatures. The Government was pledged to support the West Indies in case of need and would continue to fulfil that pledge to a federated West Indies which would be eligible for such assistance from the Colonial Development and Welfare Fund as might be available for the individual colonies collectively. Until such time as a federated West Indies attained full Dominion status, it would remain under the supervision of the Colonial Office.

NOTES

Report on the Rome Conference, 1950.—Representing the University, the Society of Comparative Legislation and the London Institute of Advanced Legal Studies, I attended the Conference held at the International Institute for the Unification of Private Law in Rome, which took place from the 8th to the 16th of July. This Conference which met daily in two main groups, was attended by, so far as I could judge, about 150 delegates from the principal countries of Western Europe, from North and South America, and Japan. The subjects discussed consisted of Private Law matters thought to be ripe for comparative study with a view, in some cases, to their unification.

There seemed to be general agreement that further work might be done on the unification of the Law relating to negotiable instruments and on international contracts of through carriage by land.

At the request of the Institute I gave a paper on the Law of Trusts and heard a comparative discussion on the subject. Although there are certain similarities between the Italian Fiducia and the Trust, and although in Mexico and other Latin American countries, as well as France and Germany, there are some institutions resembling Trusts, it was not thought that the time was ripe for the transplanting of the Trust into other countries.

The Conference was well run, the hospitality gracious, and the opportunities for meeting first-rate academicians, lawyers and practioners was invaluable.

B. A. Wortley.

Tulane Law Review.—Recent numbers of the *Tulane Law Review* contain matter of considerable interest to comparative lawyers. The October, 1949 number contains a long article by A. Lemhoff entitled "The German (Bonn) Constitution with Comparative Glances at the French and Italian Constitutions." The December, 1949 number contains a digest of the law relating to "Juristic Acts in the Civil Law," by Dr. C. Sumner Lobingier, which is not only interesting as crystallizing the experience of various civil law countries in this branch of the law, but also exceedingly valuable for the references to a large number of codes which are contained in the footnotes. The notes also include many references to Louisiana cases. It is an article which could be made the basis for an excellent seminar on the subject. The March, 1950 number contains a short article entitled "Two Creations of Praetorian Jurisprudence under French Law," by Mr. J. Constantinoff, which deals summarily with quasi-contract and natural obligations. In the same number Dr. Ernst Rabel has a very important article on "The Nature of Warranty of Quality," which gives a foretaste of what is to appear in a forthcoming volume of his great work on the comparative law of Sale of Goods.

[4] Greenidge: *op. cit.* p. 333.

South African Law Journal.—The *South African Law Journal,* now edited by Professor H. R. Hahlo and Dr. R. G. McKerron, has assumed a new and much more attractive format. Part II of Vol. LXVII seems of particular interest to English comparative lawyers because it includes two articles on the problem of liability for honest misrepresentation. A more personal point of attraction is given by extracts from letters written by Sir John Kotzé to Professor R. W. Lee. This is only the first of two series of extracts from the correspondence of this very famous judge, perhaps the most famous of 20th century judges in South Africa. They are mainly on technical points, but range over an immensely wide field. As one would expect, there is a good deal about the problem of *Causa* in the civil law.

Revue Internationale de Droit Comparé.—The *Revue Internationale de Droit Comparé* (the successor to *Bulletin de la Société de Législation Comparée*), continues to hold much material of great interest to lawyers everywhere. Apart from the articles, attention may be drawn particularly to the very full description of comparative law activities throughout the world, and also to the full reviews of Russian books on Soviet law, which gave to those not familiar with Russian an excellent notion of what is going on within the Soviet Union.

Revue Critique de Jurisprudence Belge.—The *Revue Critique de Jurisprudence Belge,* now in its third year, has adopted the policy of including in each quarterly number a critical examination of the case law of the last ten years in various branches of legal activity. These branches are to be as follows: (1) Persons and real rights; (2) Successions, donations, testaments and marriage contracts; (3) Obligations and particular contracts; (4) Civil responsibility; (5) Commercial law; (6) Civil procedure; (7) Social law; (8) Private international law. This year's numbers contain reviews of (2), (3), (4) and (7). They seem to be very well done, and they give an excellent impression of the way in which the law on these topics has developed in recent years. The review fulfils a badly felt need, the more especially as Belgian publications are very expensive in this country. It has never appeared quite worth while to acquire a library of Belgian law; but the foreign lawyer will now have an opportunity of noting quickly the more important differences between Belgian law and French law, which for the most part it so greatly resembles.

Legal Periodicals from the Argentine.—If one did not know already that the Argentine is the most highly developed country in the southern hemisphere of America, one could easily guess it from the legal periodicals reaching us from there. The four periodicals, now before us, are witness to the intensity with which both legal practice and legal theory are being advanced and of the fact that this is done on lines combining a great deal of the tradition of both Continental Europe and the U.S.A. The Jurisprudencia Argentina is a daily paper, pretty much on the lines of the French Gazette du Palais. It contains in addition to reprints of the most recent judgments of higher courts articles—some of them of considerable length—on points of practical interest and the text of legislation, both on the regional and the central level. The Boletin, published by the Ministry of Justice since the autumn of 1949 also follows closely the model of Continental European ministerial gazettes, with the sole exception perhaps, that its outward appearance shows much greater splendour than is possible in the impoverished Europe of today. It contains the text of laws—together with their "motives"—of ministerial directives, legal statistics, some of which are of very great interest, appointments, promotions and other news which one can expect from a periodical of this type. The Boletin Informativo of the Faculty of Law and Social Sciences of Buenos Aires of which the first issue has been published in October 1948, on the other hand, would scarcely find a parallel in Europe. It is a publication addressed in the first instance to old alumni of the Faculty, giving in the greatest detail news of the work conducted at the University, enlivened by photographs of the leaders of the Faculty and its numerous foreign guest lecturers. The latter comprise—among other scholars of repute—Carnelutti (Rome), Greenwood (Montreal), Ruggiero (Rome), Marc Ancel (Paris), Joseph Hamel (Paris), Martinez (Valencia), René David (Paris), Rotondi (Milan) and Arangio-Ruiz (Naples). The list will surprise many by the number and splendour of the names comprised in it. The absence of scholars from the U.S.A. and from this country is perhaps significant. Difficulties of language and the differences between the civil and the common-law system are obvious explanations.

The Cuadernos Periodicos, published by the Institute of Political and Constitutional Law of the same Faculty, the first issue of which was also published in 1949, belong to an altogether different class. This is a high-class scientific periodical, devoted to problems of constitutional and administrative law and to general questions of Jurisprudence. As in other South American legal periodicals, very extensive reviews of recent books are a feature of special interest. The first issue contains a review in no less than 14 pages of a Catholic criticism of Maritain's conception of the human personality, which leaves little to be desired in the way of frankness. Comparative lawyers will be interested in a well-informed summary of the legal and political history of the birth of the German Federal Republic. The author of the latter, however, has made one regrettable, though wholly excusable, slip. He mistakes C. Schmid, the Tübingen Professor of international law, for C. Schmitt, the former Berlin Professor of constitutional law, one of the most outspoken and radical exponents of the Nazi theory of law. C. Schmid—now generally referred to as Carlo Schmid, for the sake of distinction—is a life-long Socialist, who has never given the slightest assistance to Nazism and whose leading position in the German legal world of today is in every respect to be welcomed. He has nothing in common with Carl Schmitt, whose teachings have misled an entire generation of German students, except a superficial similarity of names.

E. J. Cohn.

French Civil Code.—Professor G. -H. Camerlynck with the assistance of Dr. R. Decottignies, has compiled a "Code Civil de l'Union Francaise" (Paris: Librairie Generale de Droit et de Jurisprudence, 1950), which is designed to show the extent to which the French civil code is in force in the various portions of the French Empire. Each article is set out in full with the necessary information, and the whole is preceded by a long introduction distinguishing between the various territories, according to their varying legal history, and is followed by a table of all the texts applying French law to these territories. The volume seems admirably fitted to aid those who wish to know the civil law of the French Empire.

Zeitschrift fur Ausländisches und Internationales Privatrecht.—The famous *Zeitschrift für Ausländisches und Internationales Privatrecht*, founded by Ernst Rabel was revived in 1949 by the Kaiser Wilhelm-Institut at Tübingen. We have received on exchange three numbers, the first of which contains for the most part material on various kinds of private international law, and the second interesting articles on the recent developments in private law in France, Spain and Czechoslovakia. Both numbers contain notes on the recent case of the 6th Duke of Wellington. We welcome warmly the revival of this journal, the more especially as it shows how flourishing the study of comparative and private international law is in Germany.

Czechoslovak Private International Law.—The recent Czechoslovak Act of December 7th, 1949 published on December 27, 1949 under No. 266 of the Collection of Laws, 1949 brought about i.a. certain changes in the Czech Act on Private International law of March 11th, 1948, a translation of which was published in this Journal part III-IV, pages 78-88.

By section 46 it was provided that sections 6 and 11 of the Act dated March 11, 1948 relative to Private International Law will become void as from January 1st, 1950, when the new Act No. 266/1949 comes into force.

Sections 6 and 11 of the Act of March 11, 1948 dealt with the dissolution of marriages between the surviving spouse of an untraceable person who has been declared dead. The new corresponding provisions of the Act 266/1949 are contained in sections 3 and 41 of the Act 266/1949 and read as follows:

Section 3: "The marriage of a person who has been declared dead is dissolved on the day when the decision on the declaration of death acquires final validity. When calculating the time decisive for the determination of parentship it is however assumed that the marriage was dissolved on the day which was stated in the decision on the declaration of death as the day of death."

Section 41: "The marriage of a person who has been declared dead is dissolved on the day on which this Act comes into force provided it had not been dissolved before."

In view of the re-organization of the Czech judicial system it became necessary also to alter Section 57 of the Act on Private International Law. Section 57 dealt with the appointment and exercise of guardianship, curatorship and ancillary curatorship

and provided that the competent Czech court had to obtain in certain cases the approval of the Court of Appeal. As by re-organization of the Czechoslovak judicial system the old Courts of Appeal were abolished, it became necessary to transfer this competence of the Court of Appeal to the Supreme Court, which was done by Section 48 of the new Act No. 226/49.

A. DRUCKER.

Two Latin-American Legal Periodicals.[1]—To publish annually a periodical of some 1,000 pages devoted exclusively to problems of legal theory and jurisprudence is surely no mean achievement. The Universidad Nacional Autonoma of Mexico has repeated this feat now for no less than eleven years. It is true that the term "jurisprudence" is somewhat broadly defined by the authors: it includes subjects of international and of comparative law which are of general interest, thus enabling the editors of the last volume to print articles like those of Dr. A. Levi on the constitution of the Italian Republic or Dr. Kunz' lecture on the conception of legitimate defence under art. 51 of the Charter of the United Nations. But there can be no doubt that just this breadth of scope has been one of the reasons for the success of this Review. The present volume contains in addition to a great number of other articles and —as always—most extensive reviews, a summary of a discussion by the members of the Faculty of Law, presided over by Professor de Couture from the University of Montevideo, on the fundamental principles of the law of civil procedure, which makes most interesting reading.

Coming from this Mexican Review to the Revista Juridica de la Universidad de Puerto Rico is like coming into another world. While the Mexican periodical clearly shows all the characteristics of a European Continental publication, North American influence is strong, both in the contents and the form of the Puerto Rican law journal, whose lay-out resembles closely that of the usual University Law Journal of the U.S.A. Most of the articles are devoted to problems of a severely practical character. Occasionally there is even an article in the English language—in the volume at present under review, one whose outstanding importance to both the North American and the Puerto Rican business world cannot be doubted. The subject-matter of this article (by Baker and Beckerleg) is the so-called "operation bootstrap," a spectacular attempt by the Government of Puerto Rico to improve the economic situation of the country by offering tax exemption to certain industries which are either not yet or only in a small way represented on the island. No doubt many lawyers on the American mainland and elsewhere will have grounds to consider the terms of this unusual enactment. The volume contains, however, also at least one contribution of jurisprudential interest and one at that, which is of particularly high value, i.e. Professor Couture's article on the future of codification and of the "common law" in the Americas. The author is, of course, by views and temperament a civilian jurist. One may hope that his opinions find an open ear among local practitioners: at least some of the judicial decisions from Puerto Rico seem to evince a curious tendency towards interpreting a civilian code with the methods of common-law-technique, the results of which are somewhat disconcerting even to those who refuse to be called purists.

E. J. COHN.

Canadian Bar Association.—The 1949 Year Book of the Canadian Bar Association contains among other things some interesting information in a speech of the Dominion Minister of Justice, Mr. Garson, about the establishment of a Criminal Code Revision Commission, and of a Statute Revision Commission under the Chairmanship of Chief Justice Rinfret. He also announced a consolidated Bankruptcy Bill. The address of Lord Morton of Henryton contains a description of the way in which the advice of the Judicial Committee of the Privy Council is arrived at and drafted. The volume also contains the reports of the regular committees and the by-laws of the Association.

The 1949 Proceedings of the Conference of Commissioners on Uniformity of Legislation in Canada, which can be obtained either in a separate binding or bound up with the Proceedings of the Canadian Bar Association, contains the usual Table of Model Statutes with particulars as to Adoptions. The Nova Scotia Commissioners

[1] Revista de la Escuela Nacional de Jurisprudencia. Universidad Nacional Autonoma de Mexico. Vol. xi. No. 41-44. 1949.
Revista Juridica de la Universidad de Puerto Rico. Vol. xviii. 1948-1949.

ubmit a very interesting report on the problem of Commorientes, together with a lraft Uniform Act respecting the registration of births, marriages, deaths and other ital events, which appears in what may well be its final form. New sections and mendments are proposed for the Uniform Assessment of Book Debts Act, and there s an interesting amendment on the Uniform Intestate Succession Act. The Uniform Mechanic's Lien Act is reproduced in the volume, but consideration of it has been lropped for the time being.

Czechoslovak Nationality.—Among the numerous new Czechoslovak laws of nterest for the comparative lawyer is the law on the acquisition and loss of nationality of July 13th, 1949, Collection of Laws of the Czechoslovak Republic 1949, published on August 10 and effective as of October 1st, 1949. According to this new law Czech nationality is no longer based exclusively on the principle of *Jus sanguinis*. A child born abroad of parents of whom one is Czechoslovak nationality can become a Czechoslovak citizen provided a District National Council in Czechoslovakia grants the application for the child's Czech citizenship which must be submitted within one year after birth. The granting of Czechoslovak citizenship in this case is left to the discretion of the said administrative authority. A child born in Czechoslovakia becomes a Czechoslovak citizen if at least one parent is of Czechoslovak nationality. Czechoslovak nationality is acquired by a foreign woman marrying a Czechoslovak citizen only if the District National Council grants such nationality upon application which may be submitted before but must not be submitted later than 6 months after the marriage. Czechoslovak nationality may furthermore be granted by decision of the Czechoslovak Ministry of the Interior which, as the law provides in section 3, para. 2, "decides according to its free discretion." Although section 3 provides that such persons should be resident in Czechoslovakia for at least 5 years, para. 2 of this section provides that Czechoslovak nationality may be granted also to persons not resident within Czechoslovakia. (!!) In the case of a married couple either party may be granted Czechoslovak nationality independently.

The loss of Czechoslovak nationality is dealt with in Sections 5 to 8. A Czech woman marrying a foreigner loses her Czech nationality provided she acquires by her marriage the nationality of her husband. The District National Council may however, upon application, grant her continued Czechoslovak nationality.

Czechoslovak nationality may furthermore be lost by release and in the case of a married couple either party may be released upon application independently. Czechoslovak nationality is further lost by administrative decision of the Ministry of the Interior. Such decision withdrawing Czechoslovak nationality from a Czech national may be carried out in the case of persons resident abroad engaging—in the view of the Ministry of the Interior—in activities inimical to the Czechoslovak State.

Czechoslovak nationality may further be withdrawn from persons who left Czechoslovakia illegally or did not return there within 30 days after being requested to do so by the Ministry of the Interior.

A. Drucker.

American Civil Liberties.—The continued preoccupation of American public opinion with the danger of Communist infiltration gives a general topical interest to the latest report of the American Civil Liberties Union,[1] which gives a general account of events affecting civil liberties during the year ending August, 1949. The report's conclusion is on the whole an optimistic one. Despite over-hasty action by some State Legislatures and some consequent interference locally with academic liberties in particular, the general record suggests that the public has been more temperate than some of its elected representatives, and that the courts have on the whole performed their functions with proper attention to the Bill of Rights. The record as regards race-relations is on the whole also not too unsatisfactory. On the other hand, certain questions involving censorship and free speech and the use of school buildings for religious teaching are obviously not so easily soluble, since what may seem to one racial or religious minority something bordering upon persecution can sometimes only be stopped by what to others will look like another form of offence against civil rights. The five to four decision of the Supreme Court quashing a sentence on an anti-Semitic agitator provides a good example of the dilemma (*Terminiello v. Chicago*. 337. U.S.I. (1949)). A more technical issue upon which the American law is still confused is to what extent loudspeaker vans are covered by the general right of free speech.

[1] *In the Shadow of Fear*, (American Civil Liberties Union. 29th Annual Report. New York, 1949.) 88 pp.

Mr. Fraenkel's handy little pamphlet[2] will be useful to anyone wanting in compact form a listing and brief analysis of past decisions of the Supreme Court in what has now become one of the most important fields of its activity.

MAX BELCFF.

Mexican Comparative Law.—This admirably produced periodical[1] is clearly of the greatest value to any comparative lawyer within or outside Mexico. The range of interests which it serves is world-wide, as is witnessed by the topics treated in these two issues which include the Land Registry Systems of Great Britain, the U.S.A., the Islands of Hawaii and Philippine Islands (by R. G. Patton), the Social Security System of Peru (by J. A. Gonzales), the matrimonial regimes of South America (by Dr. Rodriguez y Rodriguez, until recently the technical director of the Boletin, whose untimely death no doubt constitutes a grave loss to comparative legal science, the presidential system outside the U.S.A. (by Professor Löwenstein) and the equality of creditors in international bankruptcy law (by Professor Nadelmann). In addition to these most instructive articles there are surveys of legislation, book reviews and summaries of articles in legal periodicals covering not only South and North America, but including a number of European countries. It may be hoped that the legal periodicals of this country may in the future also be included in these surveys which no doubt research students in South America will find of the greatest assistance.

E. J. COHN.

Revista Juridica de la Universidad de Puerto Rico. Vol. xviii (1949).—This volume contains in addition to other valuable contributions a most interesting study by Señor Pedro Munoz Amato, Dean of the College of Social Sciences of the University of Puerto Rico, written in English on the conception of Democratic Socialism. The author's conclusion is that in the conditions prevailing in this country some measure of economic control is possible without endangering the basic values of democracy. The author is not blind to some of the faults of the English constitution. He describes the House of Lords as "an anachronistic defiance of democracy," which in his view "should be abolished." He thinks that in the House of Commons a simplification of the rules of procedure is overdue and that the legislative process would gain much in efficiency by increasing the participation of experts as advisors of the elected representatives. But party government and strict party discipline are in his view responsible for the high standard prevailing in the House of Commons and the British Cabinet is in his view decidedly superior—both for the purpose of policy making and for administrative action—to the American system of executive leadership. One may perhaps be doubtful whether he does not underrate the part which the judges can play in preserving the liberties of the individual. His views on this topic seem coloured by the excess of power granted under the American Constitution to the Supreme Court. As always the Revista excels in the manner in which book reviews—some of them brief essays of their own—are presented.

E. J. COHN.

Penal Reform in Canada.—Penal reform in Canada is a topical subject. In 1938 the Archambault Report presented a grim picture of the prevailing penal system. Only last year a new Commission had been appointed to report on the revision of the Criminal Code which still bears the mark of Sir James Fitzjames Stephen's English Draft Code of 1877. It is therefore most gratifying that the editors of the Canadian Bar Review, who have always been generous in allocating space to articles on criminal law, published a symposium of eight important contributions on Canadian penal policy, appropriately supplemented by two reports on conditions in England (Miss C. M. Craven) and California (R. M. McGee).[1] Progress is implementing the recommendations of the 1938 Report has been slow. Only on the federal level a "New Deal" in penal policy has been launched in 1947; a Commission of Penitentiaries, on the model of the English Prison Commission, has been established, the standard of prison personnel raised, and new types of Vocational and Classification Officers have

[2] *The Supreme Court and Civil Liberties*, by Osmond K. Fraenkel. 3rd revision. (New York: American Civil Liberties Union, 1949.) 79 pp.

[1] Boletin del Instituto de Derecho Comparado de Mexico. Universidad Nacional Antonoma de Mexico. Vol. 2, numbers 4 and 5, January to August, 1949, 235 and 251 pp.

[1] Penal Reform in Canada. *Canadian Bar Review*, vol. xxvii, No. 9, November, 1949.

een introduced into the federal penitentiaries (Commissioner R. B. Gibson). There , however, still no unification of provincial and federal penal administrations under ne centralized authority, no efficient system of probation for adults, nor is there any ational system of parole and after-care (A. E. Maloney), though Mr. J. A. Edmison estifies to much devoted work in "civil rehabilitation." Professor Jaffary sums up ne situation as "a conflict of nineteenth century legal theory and twentieth century nowledge" (1022). According to Mr. H. G. Christie, Director of Corrections, Pro- ince of Saskatchewan, the worst, almost pre-Howard, conditions prevail in some of ne provincial penal institutions, where punitive repression of mere symptoms is still ominant while progress in preventative and curative methods remains largely verbal 1052 seq.), and "a full day's work is almost unknown" (1061).

This state of affairs gives Canada a great chance to build up by one great effort consistent system of preventive and corrective treatment, to make use of experience ade abroad, and to avoid mistakes which have been made elsewhere. Chief Justice . C. McRuer, a leading member of the Archambault Commissión, reaffirms and supple- ents the recommendations of the 1938 Report by a comprehensive reform pro- ramme. In his illuminating introductory paper, "Sentences," he suggests the stablishment of a probation system for the supervision of all released and suspended entences, pre-sentence reports by probation officers, abolition of statutory minima, dministration of conditional release by the prison authorities, supervision of released risoners by probation officers, and unification of federal and provincial penal dministrations (1018). He does not challenge corporal punishment on principle, but emands strict regulations with regard to the instrument used and the number of trokes applied, in order to exclude any arbitrary differentiation. Recent develop- ents in California where the selection of sentences and their ultimate length has een shifted from the trial court to a Youth Correction Authority, and more recently ven to an Adult Authority (1131), meet with much interest among the authors of hese papers, but the view prevails that such a course would be incompatible with he English conception of the function of the judiciary in a due process of law. As hief Justice McRuer puts it: to leave the final determination of detention in penal nd corrective establishments to administrative tribunals "would set the hands of ustice back two hundred and fifty years" (1016). Mr. Maloney goes even further n his demands for legal safeguards of personal liberty and suggests a public trial for rison offences, that is to say a trial where the prisoner is entitled to legal counsel nd the press is admitted (1071). These points illustrate the root of the problem, he ultimate purpose of any penal reform, to strike the right balance between the rotection of society against the criminal, and the protection of the prisoner against he risk of arbitrariness and injustice.

Penal reformers all over the world will welcome a new departure in Canadian penal olicy on the lines discussed in this valuable publication. The suggestions put orward in these contributions strengthen the impression of a growing amount of ommon ideas on the treatment of offenders beyond national frontiers and municipal egal systems.

M. G.

Two Important Books on Comparative Law.[1]—The history of comparative law s strewn with quarrels over aims and names; and perhaps the first lesson the eveiwer has to learn is to avoid unprofitable discussions. All he is entitled to ask s, what has the author set out to do, how has he done it, and, occasionally, was it vorth doing. If then anything is said here about the titles which the authors ave chosen to give to two important recent books on comparative private law, it s not in order to disagree, but to show the contents they cover.

Professor David calls his book a "Traité Elémentaire de Droit Civil Comparé." hich may be translated "A first book for the comparative civil lawyer." It is ivided into three parts, to which is annexed a skeleton bibliography of different ystems of law. The first part discusses the ends which can be aimed at in the omparative study of law, and the valuable results which may be attained. This art is of course very well done, but the reader may be left in some doubt of its ractical value, unless it be to strengthen in the faith those who are already nterested in comparative law, and to furnish them with arguments with which to onvince others of its importance. Perhaps, however, some stray reader may be onverted. The second part, which is devoted to a characterization of the most

[1] *Traité Elémentaire de Droit Civil Comparé.* By René David. (Paris: Librairie Générale de Droit et de urisprudence, 1950.) vi+556 pp.

important legal systems in the contemporary world, is much more interesting and useful. The systems which the author considers to be primary are five: Western law, Soviet law, Mohammedan law, Hindu law and Chinese law. Thus his divisions are based on very broad differences of ideology or, perhaps better, of civilization. He relegates technical differences to a secondary place; and so, while giving due prominence to the peculiarities of Anglo-American law, he makes of it merely one of the two groups into which Western law is divided. He is even more decided in his refusal to grant any marked autonomy to the laws of Germany and Central Europe: they certainly differ in many ways from the law of France and of the countries whose codes are closely related to hers, but they are very much in the same camp. Here it is possible to have some sympathy with him. However, he makes a much better point in emphasizing the need for separate treatment of Latin American law, with its very special and varied problems created by the projection of European law into a new environment, physical, economic and human. He insists too on the separation of American from English law. But in truth what gives to this part its vivid and interesting character is not the arguments for this or that classification but the by-products of the discussion, that is to say, the rich evidence that is brought to bear. Indeed, Professor David is too experienced to be taken in by any scheme, and just when one is about to quarrel with him for attributing to one legal system or group some characteristic that one knows belongs, though somewhat less evidently, to another, he makes the point himself. Thus he has come to feel, very properly, that the technical differences between English and French case law have been given far too great prominence; and he understands perfectly well that the Chinese aversion to litigation and preference for social controls are just as prevalent in the west, though they are not so clearly enunciated in our philosophy of law. The third part gives most valuable information of a practical kind about the facilities for the comparative study of law, with special reference to institutions, libraries and publications in various countries. If in the end one values the first two parts for the good reading matter they contain, it is this third part that will force one to keep the book on one's shelves and to refer to it again and again. Similarly, there can be no one who will not find the skeleton bibliographies invaluable, more especially for countries whose law, though most interesting, is little known to the outside world.

Any book written by M. Arminjon, Baron Nolde (who unhappily died before publication) and Dr. Martin Wolff, must be important; and their "Traité de Droit Comparé"[2] is no exception. But here again the title needs to be paraphrased as "an account of the world's laws, written by comparative lawyers for comparative lawyers." The two volumes (out of three) which have already appeared, after a fairly short discussion of the meaning and methods of comparative law, go on to describe in turn (1) elements common to modern legal systems; (2) the French legal system; (3) the German legal system; (4) Scandinavian legal systems; and (5) the English legal system. The greater part of the last-named section will appear in the third volume, which will also contain, it is to be presumed, descriptions of Soviet, Mohammedan, Hindu and Chinese law, and perhaps of some other systems. The authors have taken certain systems and have grouped round them other systems which have descended from or have been modelled on them. For this purpose it is obviously perfectly legitimate to keep French and German law apart, if only because each has been the "stock of descent" for so many other laws that a unified treatment would have been hopelessly unwieldy; and indeed the technique of codification has been markedly different. Within the various sections there is much comparison: thus the rules of Italian, Spanish or Portuguese or other "Latin" laws are regularly compared with those of French law; and a systematic description of German law is followed by a much more summary description of Swiss law, which draws attention to the points at which it departs from its German model. But there is, on the whole, little comparison, except incidentally, between the great mother systems.

The question is bound to suggest itself whether such an undertaking could be brought to a successful conclusion even by jurists with so magnificent a sweep of erudition as the authors of this work. Have they produced merely a collection of separate studies? If that is all that they have done, their work is bound to be imperfect, the more so as it was virtually complete in 1939 and subsequent events have made it very difficult to subject it to a thorough revision. However, even in detail

[2] *Traité de Droit Comparé*. By P. Arminjon, Baron B. Nolde and M. Wolff. Vols. 1 and 2. (Paris: Librairie Générale de Droit et de Jurisprudence, 1950), 540, 635 pp.

he comparative lawyer should be grateful for what they have done. There is, for nstance, no other place where the student can obtain a short and illuminating ccount, in a world language, of Scandinavian law; the short history of German law uring the nineteenth century, followed by a general characterization and criticism f the BGB, are incomparable; it is impossible to find elsewhere in one place an ccount of the contributions made to modern legal systems of Roman law, Canon aw, the Law of Nature and the Mediaeval Law Merchant, or of the extent to which he law of the civilized world has in fact been unified. Nowhere else can be found uch compendious accounts of the various receptions of foreign law which have taken lace all over the world. Moreover, it is seldom that great jurists, who are complete nasters of their own and other laws, are able to devote their declining years to the ask of giving a bird's eye view of various legal systems and exposing frankly and ith a sureness born of long experience their merits and defects. At the very worst, nerefore, this book contains a superabundance of good things; and it is seldom dull. urther, it may be recommended as the place to which one should naturally go rst if one wanted to understand an unfamiliar institution in a particular foreign law, nowing that although it may not be precisely accurate in detail—though this is nfrequent enough—it will never be misleading.

However, the book is much more than a mere encyclopaedia. Although it etrays the inequalities which are bound to result from cooperation, it is quite oherent; and this impression will probably be enhanced when the third volume ppears. In places the merely descriptive matter is perhaps too densely packed and n the whole the more general, mainly historical, chapters read more easily than he statements of doctrine; but, when due allowance has been made for the greater ifficulty that always attends the reading of books on such a technical subject as aw, the book has something of the consecutiveness and "drive" of a good novel.

International Committee of Comparative Law.—At a session of its Provisional Bureau (executive board) held in London on July 19, 1950, the International Committee of Comparative Law was formally brought into existence, some fifteen months after the preliminary meeting which had been called by the United Nations Educational Scientific and Cultural Organization in Paris in March, 1949.

Present at the session as members or observers under the chairmanship of Prof. ulliot de la Morandière, dean of the Faculty of Law of the University of Paris, ere M. le conseiller Marc Ancel, M. André Bertrand (Acting Secretary General), I. de Sola Cañizares (Assistant Secretary General), Prof. J. N. Hazard of the Jniversity of Columbia and Dr. Szczerba-Likiernik of Unesco. The British Delegation, in the unavoidable absence of Prof. Gutteridge, included Prof. Graveson, Ir. Hamson (Assistant Secretary General), Prof. Lawson, Dr. Lipstein and Prof. Vortley.

The Statutes of the committee, which had been considered and provisionally dopted at the Cambridge meeting in December 1949, had been circulated in draft orm in most of the countries of the world, and comment upon them had been nvited. The Bureau at this session considered those comments and after amendment nally approved the statutes.

Attention is called to the fact that the committee is an international co-ordinating ody. Its constituent members are not individuals but National Committees, and ach National Committee is at liberty to adopt whatever form of organization it idges most appropriate. The provisional United Kingdom Committee has itself been onstituted as a co-ordinating body, and is at present composed of persons invited as epresentatives of Faculties of Law, institutions and societies such as the Society of omparative Legislation which teach or are concerned with comparative law.

The Statutes having been approved, the Bureau admitted, or authorised its hairman to admit, to membership the National Committees of twelve countries, mong which are included Belgium, France, Germany, Italy, the United States of merica and the United Kingdom. Applications are pending from other countries.

This is not the place to rehearse the business transacted by the Bureau. It may owever be of interest to note that Prof. Gutteridge's book on Comparative Law as considered of such outstanding importance that a grant was made towards the ublication of a translation of it which had been prepared at the request of Prof. avid by the Institut de Droit Comparé of the University of Paris. In connection herewith, the question of most general interest discussed was the method of enabling wyers in one country to obtain, in the form best adapted to comparative study,

information concerning legal developments in other countries. It was decided to give this question priority over all others, and a committee was set up to make proposals for consideration by the Bureau at its next meeting, which will be held in Paris towards the end of December, 1950.

The Committee is at present financed by a contribution from the funds of Unesco, which has shown by this act its belief in the value of comparative law as an educative and liberalising influence, and in its power to promote mutual understanding between nations by lessening the barriers created by the differences existing between the various national legal systems. Such recognition of their purposes and endeavours will evidently much encourage all comparative lawyers.

On July 20, 1950, the Bureau of the International Committee of Comparative Law held two joint sessions with the International Bar Association which was then meeting in London. The first session, presided by Prof. de la Morandière, was devoted to the method of teaching foreign law to native students, the report being presented by M. Bertrand substituting for Prof. René David. The second session, presided by Prof. Hazard, was devoted to the method of teaching native law to visiting foreign students and particularly the common law to civilians. To this session a report was presented by Mr. Hamson which included a review of the papers prepared by others for the conference and which will be published in the Revue Internationale de Droit Comparé.

C. J. Hamson.

Legislative Drafting in Canada.—Readers of our annual Summaries of the laws enacted by the provincial legislatures of Canada will be well aware of the admirable work of the Conference of Commissioners on Uniformity of Legislation in Canada. Had one school of thought prevailed in the discussions which preceded the framing of the British North America Act of 1867, Canada would have had a Federal unitary legislature to enact uniform law for the whole Dominion. The provinces, however, succeeded in preserving their rights of making law and, by way of compromise, section 94 of the Act gave the Parliament of Canada power "to make provision for the uniformity of all or any of the laws relating to property and civil rights in Ontario, Nova Scotia and New Brunswick", but no such uniform law was to have effect in any province "unless and until it is adopted and enacted as law by the Legislature thereof." In the upshot, uniformity is being slowly reached by the voluntary action of the separate provincial legislatures. At the end of the First World War the Conference of Commissioners on Uniformity of Legislation was, with the encouragement of the Canadian Bar Association, established. It has prepared and recommended some thirty model Bills on subjects ranging from bills of sale, sale of goods, fire and life insurance, partnership, defamation and frustration of contract to evidence and interpretation.

In addition the Conference produced in 1942, and has since re-issued, a booklet containing the rules of drafting which it favours and employs. The 1949 edition (of which a copy, it is stated, may be obtained on request from the secretary to the Conference, Mr. L. R. MacTavish, K.C., Toronto) comprises in a very few pages advice of great value, worthy of the company of Lord Thring's classic *Practical Legislation* or of the late Sir Alison Russell's volume, so often commended in our Journal, *Legislative Drafting and Forms*. There are hints on the use of "shall" and "may," on the preference for the present tense and the active mood, on the avoidance of long sentences and on the danger of enumerating long lists of particulars. On one minor point alone does there seem to be any difference between the Canadian models and the practice of the official Parliamentary Counsel in England. The lay-out of the former begins with the short title and the interpretation clauses; in United Kingdom Bills these normally are postponed to the end, an arrangement for which the following reason is traditionally given. Since the definitions in the interpretation clause cannot be disposed of until the contents of the Bill are properly settled, it was usual at Westminster to move to postpone consideration of that clause until the rest of the clauses had been discussed. In the Victorian heyday of Irish obstruction in the House of Commons this motion gave a first-class opportunity for filibustering. Thus, it is said, the interpretation clause came to be displaced from its logical position in the forefront of the Bill. However that small detail as it may, the public-spirited labours of the Conference are evidently making steady, if slow progress towards the goal of uniformity and good drafting.

International Congress of Comparative Law.—The Third International Congress of Comparative Law, promoted by the International Academy of Comparative Law, took place in London from July 31 to August 5, Professor R. W. Lee presiding. The opening meeting, held in the Old Hall, Lincoln's Inn, was addressed by the Lord Chancellor; and Mr. Justice Vaisey, in his capacity of Treasurer of the Honourable Society of Lincoln's Inn, extended a welcome to the Members of the Congress. Papers were read by Dr. Roscoe Pound, who took for his subject "The Development of American Law and its deviation from English Law", by Professor Percy Winfield, K.C., and by Professor M. H. Donnedieu de Vabres of the University of Paris (who, it may be observed in passing, is an Honorary Bencher of Lincoln's Inn).

On the last day of the Congress Lord Reid read a paper on "The Administration of the Criminal Law in Scotland." Other papers were read by Professor T. F. T. Plucknett (London), Professor Paul Koschaker (Ankara), Professor Giorgio del Vecchio (Rome) and Professor Kenze Takayanagi (Tokio).

The intermediate days were devoted to the work of the Sections, which comprised a very wide range of subjects.

By the kindness of the Council of Legal Education the premises of the Council at 7 Stone Buildings were placed at the disposal of the Congress, and Lincoln's Inn, Gray's Inn and King's College, London, kindly made rooms available for the numerous committees of the various Sections.

At meetings of the Academy held during the course of the Congress the following elections were made:

President: Dr. Roscoe Pound.

Vice-Presidents: Professor R. W. Lee (Oxford).
Professor Jean Escarra (Paris).
Professor Salvatore Riccobono (Rome).

President of the Anglo-American Group:
Professor Sir Percy Winfield, K.C.

President of the Latin Group:
Professor M. H. Donnedieu de Vabres.

President of the Group of Central and Northern Europe:
Professor V. Lundstedt (Upsala).

President of the Oriental and Colonial Group:
Professor M. L. Milliot (Paris).

The office of Perpetual Secretary General is held by Professor Elemér Balogh, whose industrious energy in organizing the Congress during the last two years was deservedly acclaimed.

It was decided to hold the next Congress at Paris in 1953. The question of establishing an International Association of Comparative Law in close affiliation with the Academy is under consideration.

Some 400 persons, drawn from 45 nations and including representatives of 134 Universities co-operated in the work of the Congress. There were 226 special reports and 156 general reports. (These summarize and draw conclusions from the special reports.)

A number of resolutions were passed which will in due course be made public. The publication of the general reports is the responsibility of the national committees in the several countries. Contributors of special reports are invited to make their own arrangements for publication.

R. W. L.

Semaine Internationale de Droit de Paris.—An invitation was issued to the President and Chairman of the Society to represent the Society at this Congress, which was organized by the Société de Législation Comparée and the Association Henri Capitant pour la Culture Juridique Française. As they were unfortunately unable to attend I went in their place.

The object of the Congress was to study the methods of the compilation and interpretation of the Code Civil and the influence exerted by it outside France. Reports had been sent in from various countries, and general reports were presented to the Congress by distinguished French professors. The programme was as follows:

Monday, October 16.

10 a.m. Opening ceremony in the presence of M. le Président de la République.

3 p.m. "La méthode depuis le code civil de 1804 au point de vue des sources." Rapport général de M. A. Rouast, professeur à la Faculté de Droit de Paris, et discussion.

Tuesday, October 17.

9.30 a.m. "La méthode depuis le code civil de 1804 au point de vue de la technique juridique." Rapport général de M. Roubier, professeur à la Faculté de Droit de Lyon, et discussion.

Wednesday, October 18.

9.30 a.m. "La méthode depuis le code civil de 1804 au point de vue de l'interprétation judiciaire." Rapport général de M. Boulanger, professeur à la Faculté de Droit de Paris, et discussion.

Thursday, October 19

9.30 a.m. "Le code civil française et son influence en Europe." Rapport général de M. Henri Mazeaud, professeur à la Faculté de Droit de Paris, et discussion.

Friday, October 20

9.30 a.m. "Le code civil français et son influence en Amérique." Rapport général de M. René David, professeur à la Faculté de Droit de Paris et discussion.

Saturday, October 21

9.30 a.m. "Le code civil français et son influence dans le Bassin Méditerranéen, l'Orient, l'Extrême-Orient." Rapport général de M. Maury, professeur à la Faculté de Droit de Toulouse, et discussion.

All the proceedings were most animated and instructive. I came away with the impression that some of the French were too pessimistic about the present influence of the Code Civil and were inclined to underestimate the power it still holds through case law and juristic interpretation. The meetings were very well attended by representatives from a large number of countries, and we experienced much of the traditional French hospitality at the hands of the two Societies which organised the Congress, of the Paris Faculty of Law and of the Paris Bar.

F. H. L.

NOTICES OF BOOKS.

CURRENT LEGAL PROBLEMS

This is the second of a series of annual volumes in which are collected lectures on legal topics delivered at University College, London under the auspices of the Faculty of Laws of the College. The publication has been linked with and is to be the organ of the recently founded society of graduates in law of University College so appropriately named the Bentham Club in view of the close association of the College with that redoubtable legal reformer. The first of the papers in the present volume[1] is accordingly a pleasantly informal and informative address delivered by the late Lord du Parcq as President of the Club at its inaugural dinner, on the House of Lords as the Final Court of Appeal, prefaced, alas, with a tribute to his memory. The Club, in common with the Society of Comparative Legislation, has good reason to lament the premature death of so distinguished and genial a leader and friend.

There follows a lecture by another Lord of Appeal in Ordinary, Lord Porter, who draws upon his judicial experience to comment critically on English Procedure and Practice, more particularly in Criminal Matters. He deals mainly with the questions whether in a criminal trial the prisoner should be a compellable witness and whether it should be permissable to cross-examine a prisoner on his previous history. To these questions Lord Porter gives no decisive answer but perhaps the trend of his mind is indicated in a sentence in which he observes that "it has to be determined whether we do not treat a criminal inquiry too much as a game and allow ourselves to be hide-bound by rules according to which we must play fair, giving the criminal

[1] *Current Legal Problems:* 1949. Edited by George W. Keeton and Georg Schwartzenberger. London: Stevens & Sons, 1949. Pp. viii+288. Price 21s.

a sporting chance without considering whether it be for the benefit of the community or not." In view of recent abortive murder trials in which the jury failed to agree on a verdict it would have been interesting to have Lord Porter's opinion on the desirability of adopting the Scottish practice of allowing a verdict by a majority.

Professor Vesey-Fitzgerald in his lectures on the topical and highly controversial subject of the Reform of the Law of Murder puts to good use his intimate knowledge of the provisions and working of the Indian Criminal Code. Other problems no less current are treated, if not solved, in the lectures of Professor Keeton on the Charity Muddle and Professor Wade on the Constitutional Aspect of the Public Corporation. More academic in character but not less interesting are papers by Mr. Georg Schwarzenberger on the Three Types of Law, Mr. O'Sullivan on the Philosophy of the Common Law, Professor Jolowicz on Some English Civilians and Mr. Lloyd on Codifying English Law. The last four lectures in the volume deal with problems of Commonwealth and International concern—Dominion Status, Western Union, the British Zone in Germany and the United Nations Organization.

Each of these lectures might well furnish the material for a detailed review, so stimulating to thought are they, but at least enough has been said to indicate how varied and appetising is the bill of fare here provided.

M.

THE LAW OF NATIONS

Brierly is now undoubtedly the best introduction to the International Law of Peace, whether for law students or lay students, and the latter term includes students of "politics;" it is the book the reviewer will recommend to all beginners. This new edition[1] was urgently needed, particularly because of the changed organizational side of the law and we are glad to note that Chapter III, dealing with International Constitutional Law, (legislative, executive and administrative functions) has now been rewritten; it includes a valuable comparison between the chief organs of the League and of the United Nations. The author (p.99) notes that the United Nations Charter runs to 111 articles against the 26 of the League Covenant: he says, "its attempt to provide for all contingencies has already led to frequent legalistic debates such as rarely arose under the Covenant." We are inclined to think, however, that "legalistic debates" would have occurred whatever the constitution of the United Nations, in view of the mentality which causes the veto to be used so frequently, and in view of the sort of legalistic analysis to be found in the writings of jurists like Kelsen; what we do deplore is that the United Nations Charter is a document which is altogether too long and elaborate to have any real popular appeal, or even to be grasped correctly by anyone but a specialist.

In connection with the discussion of the veto, might it not have been useful to set out article 27 *in extenso*, and to give a reference to the statement of the four sponsoring Powers on voting in the Security Council of 7.7.45, so as to make it clear that any five non-permanent members of the Security Council eligible to vote may together exercise a veto? Professor Brierly rightly, we think, does not say anything to countenance the "sitting on the fence" view, sometimes expressed now, that the failure of a great power to vote need not amount to a veto in those cases where article 27 required "the concurring votes of the permanent members." (Parties to a dispute may of course accept a decision which lacks "the concurring vote" of a permanent member eligible to vote, but other members of the organization might rightly consider such a "decision" to be unconstitutional: different considerations may, it is conceivably possible to argue, apply to a "recommendation").

". . . It seems probable that the result of insisting that only a body that had power to make binding decisions could act effectively has been to give us a body that can neither decide nor act" (p. 106). Yes; and the *Security Council* has not (as Professor Brierly points out at p.280) and never can insist on having, without the consent of the powers concerned, any national contingents at its service.

There is much to be said for Professor Brierly's view that "we have discarded the system of the Covenant which . . . might possibly have worked, and we have substituted for it one which hardly even professes to be workable . . ." (p. 283). However, if the Security Council cannot keep the peace, article 51 of the Charter preserves the right of a state to self-defence (p.291). The last chapter, on International Law and force, will well repay attentive re-reading: "self-preservation" is

[1] *The Law of Nations, an introduction to the Law of Peace*, by Professor J. L. Brierly, D.C.L., 4th edition 1949, Clarendon Press, ix+306 pp. Price 18s. 6d.

not the same thing as "self-defence" (p.293). Hall's identification of the two things would certainly, as Brierly says (p.293), have excused almost any international act of lawlessness. Any addict to the theory of preventive war should ponder upon this remarkably clear and convincing chapter which is rightly treated from the standpoint of the highest principles. "A State which refuses to submit its case does not become a judge (of its own course); it merely blocks the channels of due process of law, as, owing to the defective organization of international justice, it is still able to do" (p.295). The distinction between the law, and the means of enforcement of it, is too often overlooked by writers who profess a purely "positivist" approach. And Professor Brierly certainly does not appear to be a positivist judging from his fascinating first chapter on the origins of international law. We agree that Vattel had considerable influence (p.37), especially in Anglo-Saxon countries. And we agree that the doctrine of the "equality of states" is a "misleading deduction" by Vattel from unsound premises (presumably a supposed analogy with a supposed state of nature), and that Vattel reduced the natural law to a vague aspiration (p.38 and 39): any doubts about this will be quickly dispelled if any reader will re-peruse Vattel's chapters on lawful and unlawful wars. We agree too with Brierly in his criticism of Oppenheim's (p.47) suggestion that international law is a law "between" not "above" states. "If states are the subjects of international law, as Oppenheim admits that they are, the law must surely be above them, and they must be subordinate to it" (p.47). The alternative is in fact, as Brierly hints, anarchy, since 'consent' cannot explain the binding force of law (pp.52 and 53), for one may well ask, what makes consent bind? "If we are to explain why any kind of law is binding, we cannot avoid some such assumption as that which the Middle Ages made, and which Greece and Rome had made before them, when they spoke of natural law. The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe order and not chaos is the governing principle of the world in which he has to live" (p.57). This strikes us as sound, but we cannot easily reconcile it with the passage (at p.22) where it is said, "when medieval writers spoke of natural law as able to overrule positive law in a case of conflict, they were introducing an anarchical principle which we must reject" (p.22). Surely if international law, because it is based on reason, claims that states are subordinate to it, then international law claims the force of natural law whenever it is appealed to by those claiming to judge national law; and this occurs whenever there exists a claim for denial of justice, or an allegation of international crimes such as those made at Nuremberg.

"It is significant too," says Brierly at p.70, "that when a breach of international law is alleged by one party to a controversy, the act impugned is practically never defended by claiming the right of private judgement. . . but always by attempting to prove that no rule has been violated."

We are not very happy about the statement at p.230 that "A dictated treaty is as valid legally as one freely entered into on both sides," even though the author says a few lines later, "Clearly there is here a grave defect in the law." Is this so? Surely a reference even to recent treaties will show that the victors claim something more than force for their right to make a treaty. The Treaty of Versailles had its "war guilt" clause, article 231, and so have the recent treaties of peace which begin with a declaration that the defeated undertook a war of aggression and which accordingly include provisions for reparation and restitution. Surely the reason why a treaty signed by a defeated aggressor, *prima facie* binds the aggressor is because the treaty is not so much a contract, as a public act of justice whereby what has been wrongfully and unlawfully taken or destroyed is made the subject of restitutions.

We are a little surprised to observe (at p.232) that, with Mervyn Jones, Brierly states, "There is no legal nor even a moral duty on a state to ratify a treaty signed by its own plenipotentiaries; it can only be said that refusal is a serious step which ought not to be taken lightly." If a plenipotentiary *is* a plenipotentiary, then surely there is a legal and moral obligation to honour his signature if he acts *intra vires*, and if he is held out as one with full powers. Admittedly, as Jones pointed out, there may be cases where the need for a constitutional ratification (e.g. by the U.S. Senate) is a matter of common knowledge which impliedly limits the powers of a diplomatic agent . . . But apart from that, we believe that arbitrary and unreasonable failure to ratify is a ground for a valid complaint, and on this point we prefer the view of Professor Georges Scelle who has said that "if the power of ratification is

used with a view to injury or by caprice, the theory of abuse of right could be invoked to raise the issue of State Liability therefor" (Droit Int. Pub. 1944, p.483).

We can say all this, and still freely agree with Brierly that "The two most serious shortcomings of the present system are the rudimentary character of the institutions which exist for the making and application of the law, and the narrow restrictions on its range" (p.74). And this in spite of the U.N.O. For, as is said at p. 91, "when states do not even share in a common desire to work together, it might be better that for the time being they should cease to go through the motions of co-operation."

This book is even more stimulating and more thought-provoking than the other three editions. It has been brought up to date in essentials, for example there is a reference at p.185 to the Chicago Air Conference, but it is not, as indeed a beginner's book should not be, overloaded with references.

We respectfully congratulate the author and sincerely hope he will one day produce a second volume on the law of war of the same vintage quality as this one.

B. A. Wortley.

PRE-WAR CONTRACTS IN PEACE TREATIES

In 1946, Dr. Wolff published a monograph in England under the title "The Problem of Pre-War Contracts in Peace Treaties." Subsequent events have led to a revised and amplified edition.[1] The Author has assumed the office of President of the Supreme Court of Appeal in the British Zone of Occupation, and Peace Treaties have been concluded with the Satellite Countries. On the other hand, a Peace Treaty with Germany is still wanting. Dr. Wolff is particularly well equipped for the study of the subject. His previous experience in the application of the Peace Treaties of 1919, his familiarity with both English and German law, and his position in the judicial hierarchy enable him to speak with authority.

The effect of War on Contracts is regulated primarily by the rules of domestic law in force in the belligerent countries. However, as Dr. Wolff rightly points out, the Peace Treaties of 1919 have laid the foundation for the development of rules of international law proper which bear on the same topic. Yet the rules of international and domestic law differ inasmuch as the territorial concept of enemy character, as first developed by English law, is superseded by the test of nationality in so far as Peace Treaties are concerned. On the other hand the rules of international and of domestic law are interrelated by modern treaty practice, seeing that Peace Treaties do not normally maintain relations which have been dissolved by domestic law, or dissolve them if they are maintained under all the legal systems which may be concerned. An investigation into modern treaty practice is fascinating and complex, for it requires constant attention to and interpretation of the relevant treaties coupled with a careful regard to the domestic legislation of the belligerents. In addition, difficult questions of Private International Law arise in the absence of a stable *lex fori*. Dr. Wolff presents a clear statement of the principles involved and offers a great number of valuable suggestions for a future Treaty with Germany.

Events have shown, as Dr. Wolff rightly perceives, that as a result of the political uncertainties and economic restrictions during the period immediately preceding 1939 the effect of war upon contracts has been far less extensive during the second World War than during the first. Thus the practical application of the principles outlined in this book may be more limited than originally expected. This does not diminish the validity of the principles themselves, and it is Dr. Wolff's achievement to have outlined in a systematic manner, a branch of International Law proper which has hitherto been somewhat obscured by its counterpart in domestic law.

K.L.

JAMES IREDELL

A publisher's note informs us that the present book[1] is one of a series of "Micro-Offset Books" designed to make available in a limited edition (100 to 250) copies, works out of print and scarce but in demand for purposes of research. The photographic process used enables the original to be produced at approximately one-quarter-size so that the pages of the original appear each as one of four

[1] *Vorkriegsverträge in Friedensverträgen.* By Ernst Wolff. Beitrage zum Ausländischen und Internationalen Privatrecht, vol. 19. (Berlin and Tübingen, Walter de Gruyter and J. C. B. Mohr, 1949.) Pp. xii and 196.

[1] *Life and Correspondence of James Iredell,* by Griffith J. McRee. (Reprinted from the original edition of 1857. 2 vols. in 1. (New York: Peter Smith, 1949.)

panels to a page of the reprint. Although trying to the eyes for continuous reading, the print in the present instance at least, is perfectly legible to the naked eye, so that the single comparatively slim volume that has resulted is quite satisfactory for ordinary purposes. And the publishers are to be congratulated on an initiative that deserves success.

No list of other titles in the series is given; but McRee's "Iredell" was certainly worth doing. The English-born James Iredell of North Carolina, was nominated by Washington to the Supreme Court under the impression that he would uphold the nationalist viewpoint, but proved to be in his dissenting opinion in *Chisholm v. Georgia,* an exponent of States Rights theories and the closest to Jefferson's viewpoint among the original Justices. He defended the United States Government, however, from the attacks of its extremist critics in the crisis of the Alien and Sedition Laws, shortly before his death in 1799, in a celebrated charge to a Grand Jury, which is among the many valuable documents printed in the present work. McRee's "Iredell" is the only full-length study made from the Justice's papers, of which the originals are said no longer to survive, and is of the first importance for the study both of the early years of the Court and for the history of North Carolina in the Revolutionary and Constitutional period.

MAX BELOFF.

ESSENTIALS OF MAGISTERIAL LAW

MR. HEAD explains that this work, the result of notes made in twenty years' practice in police courts, is intended for the lay magistrate "who wishes to take more than a passing interest in the cases which his Bench is called to decide;" for solicitors who are only occasional advocates and for police officers. At the moment the only work available for them (or anybody else) is Stone's Justices' Manual, the 81st Edition of which contains 3,000 pages, citing over 8,000 cases and several hundred statutes. Such a work has obvious disadvantages; it is unwieldy; one has to learn one's way about it slowly, almost painfully; and it is addressed to the specialist —the justices' clerk and the regular police court advocate. The present reviewer doubts if one lay magistrate in a hundred ever reads it; indeed it might be dangerous if he did. Provision for the intelligent non-specialist is an admirable idea; the form and arrangement of Mr. Head's book are excellent; and if at times the effort does not quite succeed that is the fault of the material rather than the author.

Part I contains a glossary of terms commonly in use in magistrates' courts but one wonders if it is really necessary to define such colloquialisms as bottle party, bucket shop and joy-riding; or to explain that G.B.H. is a practitioners' abbreviation for grievous bodily harm. Part II deals with procedure, jurisdiction, evidence and punishments. Part III lists some sixty-eight specific offences, outlining the jurisdiction to try them, stating the punishments and giving a note of any special defence, or unusual rule that is applicable. Part IV summarises cases cited in the text. Part V consists of extracts from the more important criminal statutes and orders. The selection has been strictly utilitarian: what is the *minimum* knowledge of procedure required to understand the Court's work; what types of offence come *most frequently* before the Court; and what does the average magistrate, casual practitioner or policeman *need* to know about them?

Mr. Head's definitions are precise and his exposition is clear. But the result is that in many of the more difficult topics one gets the impression that the law is simpler than in fact it really is. Dealing with evidence he does not tell us what a leading question is; and he summarizes, as a catalogue, the various exceptions that qualify every rule of evidence; but these exceptions are often as wide as the rule itself. Dealing with motoring offences he just mentions special reasons for not disqualifying a driver convicted of driving dangerously, or while drunk or uninsured. Dealing with matrimonial affairs he gives an outline of the grounds on which an order may be made or refused. Reading any of these sections one cannot but feel that the lay man would say "this is simple;" but it is not, as a glance at *Stone* would show. Mr. Head would reply that he has given several warnings against generalization and oversimplification. In many parts of his book these are unnecessary but for other sections—the three listed above are merely examples—the present writer hopes they will be remembered; for, while it is easy to get lost in the *minutiæ* of case law, there is also

Essentials in Magisterial Law, by C. B. V. Head, LL.B., Solicitor of the Supreme Court. (London: Winchester Publications Ltd.). Pp. 453, 35s. net.

danger in assuming that the law, reduced to definition, can be "cut and dried." But the effort was worth making and we can be grateful to Mr. Head for a book that should, with this warning in mind, be in the hands of every lay magistrate.

G. A. Forrest.

HISTORY AND SOURCES OF THE COMMON LAW

This book,[1] which deals with the history and sources of the law of contrast and tort, is a welcome new departure. In the past legal histories have either been concise and compendious or highly specialized and minute in compass. Mr. Fifoot's work is an ambitious and successful attempt to inculcate the sort of legal history which will enable the reader to work for himself. In his explanatory chapters he places the reader in the middle of stimulating controversies and shows him the appropriate logic and technique. In his substantial extracts from original sources, such as old reports and books of authority, he familiarizes the reader with the raw material of legal historical studies. Where the student of modern law has his statutes and law reports to which to turn from his lectures and his textbook, the student of legal history will be able to try his wings on the sources carefully collected and translated here, instead of facing the crabbed French or Latin of the originals. It is much to be hoped that this book will help train the new legal historians who are so conspicuously lacking today, and encourage them to advance to the direct use of the originals. English law is a historical product and is and will always be undergoing historical development. The law of ten years ago is, in a sense, as much history as the law of five hundred years ago. No man may call himself a "common lawyer" unless he fully understands the foundations on which the common law rests.

The form and value of this book are so apparent as to disarm criticism. Mr. Fifoot's usual thoughtfulness and accuracy and his attractive and emphatic style need no recommendation. Some users of the book may think the narrative texts too short, others too long. This is the usual problem of a "case-book." Some may feel there are rather too many illustrations. There are gaps in date of some length in a few cases. Some of the chapters are on forms of actions, as such, others on principles of liability. The action on the Case is dealt with under a number of different rubrics. The present reviewer has no quarrel with the particular arrangement Mr. Fifoot has adopted. The nature of our legal history and the state of the sources dictates many apparent inconsistencies. Almost the only real criticism of this book is that it rather under-emphasizes the history of tort. Mr. Fifoot's work on the law of contract may have led him to slightly deeper treatment of this than its sister-subject. It may also be questioned how far the novice will be able to follow the closely-reasoned and succinct arguments. This is a criticism of legal history as a subject. At some stage the serious student must cross this bridge, and the sooner the better.

A. K. R. K.

THE REVOLT AGAINST THE HITLER REGIME

The unsuccessful revolt against the Hitler rêgime of July 1944 is an event without parallel in German history: for the first time leading German politicians and soldiers united in the attempt in the middle of a fierce war in order to overthrow their own government in whose war aims they could no longer believe. They were defeated and suffered the supreme punishment. Dr. Leibholz in this interesting little pamphlet[1] places this episode into a broader perspective. It appears as an instance of the struggle between the allegiance to nationality and that to ideology which begins to be characteristic for the conduct of international affairs in the twentieth century. A strong neo-nationalist movement is once more raising its ugly head in Germany. The recent trial of Wolfgang Hedler, a typical exponent of this new surge of nationalism, has shown that the defamation of the men of 1944 is one of the means of propaganda which the would-be restorers of German militarism are prone to employing. It is to be hoped that Dr. Leibholz' eloquent plea against this new Dolchstosslegende" will not fall on deaf ears.

E. J. Cohn.

[1] *History and Sources of the Common Law.* By C. H. S. Fifoot. (Stevens & Sons), 446 and xvii pp. £2 5s.

[1] *Ideologie und Macht in den zwischenstatlichen Beziehungen des 20. Jahrhunderts.* Gerhard Leibholz. (Göttinger Vorträge und Schriften. Band 4). Göttingen, 1949. Verlag Karl-Friedrich Fleischer. 18 pp.

FIVE JEWISH LAWYERS OF THE COMMON LAW

Professor Goodhart's little book[1] is a wonderful exercise in the economy of words. In 70 pages he describes the lives of five eminent Jews, and deals with their excellence as lawyers and their special character. Two of the judges are English: Sir George Jessel the supreme master of Equity, and Lord Reading the supreme advocate who became Lord Chief Justice. Two are American judges of the Supreme Court of the United States: Louis Brandeis who was a great Liberal, a tribune of the people, and one of the master-minds of the New Deal; and Benjamin Cardozo, who was a humanist as well as a jurist and a master of the Philosophy of Law. The fifth, Judah Benjamin, may be described as Anglo-American, because he belongs to both countries. He had the most romantic career of them all; and his life was, as *The Times* wrote, "various as an Eastern tale." In America he was the Attorney-General and Secretary of War of the Southern Confederacy during the American Civil War. And when, after a romantic escape, he found asylum in England at the age of 54, he had to start reading for the Bar as a student. But in a few years he was the outstanding advocate before the Privy Council, and he enriched the literature of the Common Law of both countries by his classic treaties on the Law of Sale of Personal Property. Professor Goodhart writes with both grace and learning, and has added a few illuminating notes about each of the five. He sums up with a few general reflections on the common qualities of these Jewish lawyers. They are marked by a fundamental liberalism; and he suggests that Jews, belonging to a minority group, can best fulfil the function of the constructive critic. Other qualities which link them are clarity of thought, interest in scholarship, and intellectual courage. Finally, he notes the dominant rôle played by the mother in their lives, and sees in this an illustration of the part which the woman plays in Jewish family life.

It is interesting to note that the English Common Law is an element today of the Law of Israel, which has taken over the law of the British Mandatory Administration of Palestine. There is every reason to expect that the Jewish jurists and judges in Israel will make a notable contribution to the science and philosophy of law; and they may develop the Common Law in the light of the Hebrew legal tradition which is contained in the Talmud and later Rabbinical literature.

Norman Bentwich.

PRIVATE BILL PROCEDURE

The publication of this second volume[1] completes the formidable task undertaken by Mr. Cyprian Williams of describing the Historical Development of Private Bill Procedure and the relative Standing Orders in the House of Commons. The first volume, reviewed and commended in the last issue of this Journal at p. 109, provided an historical narrative and calendar; the present volume contains the text of the Standing Orders with the elaborate apparatus of Notes compiled by the author on which his historical narrative was based. A vast amount of technical details relating to the evolution of the Standing Orders of the House is here made readily accessible for the first time and much interesting and curious information is incidentally disclosed. Taken together the two volumes constitute a notable contribution to an important branch of Parliamentary history.

M.

ADOPTION

Adoption is a very old concept of Continental codes of law, particularly those which stem from Roman law, but a very new one in English Law. Until 1926, public pressure was not sufficient to secure the passage of a Bill to give legal status to what had hitherto been merely a *de facto* arrangement. Considerable hardship had been worked on those who, for various reasons ranging from sterility to charity, had taken the children of others into their lives and affections. The Common Law rule was that the rights (and duties) of the parents of legitimate children and of mothers of bastards were inalienable. Often years of care, kindness and education were rewarded, when the adopted child was of age to earn, by its withdrawal,

[1] *Five Jewish Lawyers of the Common Law*, by Arthur Goodhart. (Oxford University Press), pp. 74. 5s.

[1] *The Historical Development of Private Bill Procedure and Standing Orders in the House of Commons.* By O. Cyprian Williams, C.B., M.C., D.C.L. Vol. II, pp. xiii+283. (London: His Majesty's Stationery Office, 1949.) 17s. 6d.

as an investment, by the natural parents. Sometimes the adopters' love of the child adopted made a convenient lever for the extortion of money.

By 1926, possibly as a remote result of the slaughter of the first Great War, the need for regulation of the relationship was too great to be longer overlooked, and resulted in the Adoption of Children Act, 1926. The creation, without precedent or tradition, of a new legal artificiality, presents very considerable difficulties, and it is not surprising to find that extensions, alterations or explanations of the original enactment have already resulted in two more statutes, in 1939 and 1949. The task of the draughtsmen was almost certainly eased by reference to the French Civil Code; the comparative lawyer will find his study of the latest English Act made considerably more interesting if he reads this commentary[1] by M. Auvray on the Belgian law of adoption of March 22, 1940.

Differences of detail between the two systems are immediately obvious. For example, here the adopter (with exceptions) must not be less than 25 years old and 21 years older than the adoptee (who must be an infant and never married). In Belgium, the adopter must be at least 35 and 15 years older than the adoptee (who need not be either an infant or single). Here the adopter may have children of his own; in Belgium adoption is barred to those who already have legitimate descendants. The great number of these minor points of distinction gives grounds for reflection. More fundamental matters which emerge from M. Auvray's clear account almost force a comparison of merits. Incidentally, M. Auvray's method is not comparative, except in a short historical introduction and in passing references to the French Civil code and the Belgian law as it was before 1940. But his style and lucidity are such as to invite comparison with any other law of adoption that the reader may know.

There are two great distinctions between the English and the Belgian approach. A Belgian adoption, though Court approval and registration are required to validate it, is, as M. Auvray makes clear again and again, really a contract. (v. para. 96, p. 136.) Insofar, therefore, as the law of March, 1940 does not specifically enact to the contrary, the general rules of law affecting contracts apply to adoptions. Thus if conditions that would nullify a contract can be proved (as fraud or absence of consent) it would seem that an adoption so vitiated would be also null. (v. Chapter V). An English adoption, on the other hand, whatever it may be, is not a contract. Once an adoption order has been made by the appropriate Court, it cannot be nullified by operation of law. Perhaps it is for this reason that it has not occurred to Parliament to provide in any way for the revocation of such an order, whereas the contractual nature of a Belgian adoption makes it only natural that revocation should be contemplated in certain circumstances. As M. Auvray explains in Chapter IV, the law of March, 1940 has particularly provided for revocation in a variety of circumstances, most of which look to an Englishman suspiciously like examples of failure of consideration.

The other, and more surprising divergence concerns the results of an adoption. In England, once an order has been made, all the rights, duties and liabilities (excepting any accrued rights of inheritance) tying the child and his natural parents are ended, absolutely and finally. In Belgium adoption, whilst creating a fictitious relationship of father and child, leaves coexisting the natural relationship. It seems to follow that certain duties arising from this latter continue after the adoption; for instance, the child remains under duty to support his natural parents if necessary.

Only practice can prove which system is the more successful, but it may not be only insularity that makes the arbitrary and final English method appear the more promising. The irrevocability of an arrangement greatly encourages the parties to it to make it work.

M. Auvray has a very interesting chapter on the application of Private International Law to Belgian adoptions, (ch. VII), and a section on Tutelle Officieuse. This is a curious half-way house between guardianship and adoption (ch. VI). The main reason for its existence was that, before 1940, the Belgian code did not permit the adoption of minors, and at the same time required that before any adoption was approved by the Courts there must be proof that the proposed adopter had furnished a certain amount of care and succour to the proposed adoptee. To prepare the ground, therefore, it was possible to set up a *tutelle officieuse*, whereby

[1] *L'Adoption et la Tutelle Officieuse.* Commentaire théorique et pratique de la loi du 22 Mars, 1940. Gabriel Auvray. (Bruxelles: Etablissements Emile Bruylant, 1949.) 179 pp. 200 francs.

the tutor undertook to administer the affairs of the pupil without charge and to take upon himself the expense of the child's upbringing. In practice, as would be expected and as M. Auvray points out, nobody who did not intend an adoption ever undertook this duty. As the adoption of minors was made possible by the law of March, 1940, the point of *tutelle officieuse* was gone and the draft law very sensibly proposed its suppression. It is amusing to find, from M. Auvray's account, that legislators bedevil drafts in Belgium as well as here; the Chambre accepted the proposal but the Sénat would not, and, as a kind of compromise, a modified form of *tutelle officieuse* was inserted into the law of March, 1940. Unfortunately it was not properly equated to the new law of adoption so that some of the detailed requirements of each do not tally. The result is the continuance of a useless institution which M. Auvray well describes as "an exhibit for the legal museum."

M. Auvray's work is not only an account of the law as it is, but a commentary upon it, and particularly interesting when it gives his views of those problems left undecided by the law of March, 1940. No legislators can foresee all the contingencies that will arise in life, and it makes little difference to the student or practitioner whether he assists himself to decide something novel by reference to decided cases, as in the English system, or to the opinions of the glossators as in Belgium. It is however instructive for an Englishman to see the latter at work, and this book provides many examples. In the jargon of the Christmas reviews, this is an excellent addition to any comparative lawyer's stocking.

E. R. Guest.

FACT-SCEPTICISM

Twenty years ago Jerome Frank startled legal opinion in the United States by the unconventional views which he expressed in his first important book, "Law and the Modern Mind." In the course of those two decades the book has run through six printings, Frank has become a Federal appellate judge, and the unconventional has mellowed into something akin to respectability. And yet the views expressed in the first English edition of "Law and the Modern Mind"[1] are substantially identical with those of 1930. The change is not to be found in the book, but in the American reader. The constituent qualities of "Law and the Modern Mind" are not extravagant sensationalism, not psycho-analysis (as is sometimes alleged), but much common sense, elementary psychology, burning enthusiasm and, in places, jurisprudence.

In essence this book sets out to do two things. First to explode what the author calls the "basic myth" of legal certainty, and secondly to bring to light certain factors, psychological and otherwise, which influence both judges and juries in the process of deciding issues. These two major themes are closely inter-connected in the fact of the hitherto insufficiently explained influences in the judicial process leading to uncertainty in law. If we may translate Judge Frank's thesis into an English context (for which, admittedly, it was not specifically intended) he seems to overemphasize the illusion of certainty in the mind of both layman and lawyer. So far at least as English lawyers are concerned, there does not in the writer's experience appear to be such blind adherence to the idea of complete legal certainty as the book suggests. Although the layman's attitude to law may at times be naïve, for the lawyer scepticism is a professional disease. Many would agree, accordingly, that "the law always has been, is now, and will ever continue to be, largely vague and variable"[2] and that "much of the uncertainty of law is not an unfortunate accident: it is of immense social value."[3] This consciousness of uncertainty in law comes only, though almost inevitably, with experience of practice; for one finds little of it in professional training in England, and even less in Continental countries under the dogmatism of codified law. Most of the questions set in English professional examinations, for example, imply that there is a certain and conclusive answer which can be discovered by the application of different combinations of well-defined rules. This mechanistic view of law, fortunately, is far less prevalent in academic training. No less fundamental is the author's contention of an unnecessary quest for certainty which is apparently not limited to law. What is admittedly a partial explanation of this desire is a survival of the child's attitude towards his father as an omniscient and all-powerful being, a theory which "rests on observations of current

[1] *Law and the Modern Mind.* By Jerome Frank. (London: Stevens & Sons Ltd., 1949.) xxxi+368 pp. 25s. This edition is a photographic reproduction of the 6th American printing (1949).
[2] P. 6.
[3] P. 7.

phenomena clear to the eye of any amateur anthropologist in any modern group.[4] The author is at pains to emphasize that this is not the only cause of the demand for certainty, and he lists fourteen other possible causes. In the sense, however, that this child-father complex is treated exclusively throughout "Law and the Modern Mind" for the sake of emphasis as the sole cause, a certain unscientific lack of balance is apparent which gives the book all the qualities and many of the shortcomings of a caricature. A different explanation which is not specifically mentioned is the eternal appeal of the external standard inherent in natural law thinking, which is less a desire for certainty than for validity, based on a higher law. It is a mistake, however, to assume that the author either denies the existence of certainty or decries its value. His aim is to show that much of what is considered certain neither is nor should be so.

In a chapter on the language of the law, Judge Frank exposes the legal practice of all so-called rationalization, and shows how legal development has taken place through the reconciliation of contrary situations and cases, rather than by the conscious rejection of the earlier rule. In a legal system such as ours in which courts of appeal are generally bound by their own decisions, the practice of distinguishing cannot be more than an unsatisfactory compromise to the legal purist. But it may be suggested that this legal reconciliation of opposites is not based on the Judge's belief in certainty, but on his efforts to make law, so far as it can and should be certain, a consistent and reconcilable body of principles. The need for a new principle based on a new situation which has to be fitted into the existing body of law calls for a rationalization under any system of reasoned decisions, but one must agree with the learned author that not even such a need justifies the use of language which indicates that no change is taking place. It is surprising to an English lawyer to learn that the declaratory theory of precedent prevailed in the United States in 1930. Judge Frank shows a lack of familiarity with commonly accepted English views when he accuses Pollock of error for denying that any intelligent lawyer would pretend that the decisions of the courts do not add to and alter the law.[5] The legislative power of the courts is sufficiently well recognized in England to have been expressed by the courts themselves.[6] Thus the allegation that the basis of the traditional theory of precedent as the declaration of existing but hitherto undiscovered law is a demonstration of the childish desire for certainty loses most of its point for England of the present day, and it would not be surprising to discover that it was an exaggeration also in respect of the United States. Incongruously, however, Frank applauds the use of fictions as valuable legal devices since the legal fiction is a type of myth which deceives nobody.

The dominant theme of scepticism which runs through this book appears strongly in the learned author's attitude towards the definition of law. He defines it reluctantly and for the purpose of his essay as "specific past or future judicial decisions which are enforced or complied with."[7] But he regrets his rashness even in suggesting a rough definition for a limited purpose, for he asserts in his preface to the sixth printing that it is a mistake in most cases to use or attempt to define the word "law."[8] While on the subject of definitions, it is of interest to add Judge Frank's description of the modern mind as "a mind free of childish emotional drags, a mature mind."[9] The author's attack on what he calls legal fundamentalism as personified by the late Professor Beale loses much of its point by overstating the case against Beale's assertion of uniformity, generality, continuity, equality, certainty and purity as necessary legal characteristics. It is considered that much of the justification for legal fundamentalism is based on man's natural law feeling for a higher standard of validity, however imperfectly imitated in positive law, and the author himself observed in his recent preface: "I do not understand how any decent man today can refuse to adopt . . . the fundamental principles of natural law."[10]

After a careful analysis of child psychology in its application to the grown man, and an emphasis on the need for scientific training in law, Judge Frank gives us what is perhaps the most important lesson of his book in urging lawyers to catch the spirit of the creative scientist, a spirit "which yearns not for safety but risk, not for certainty but adventure, which thrives on experimentation, invention and

[4] P. 20.
[5] P. 33.
[6] See, for example, judgment of Evershed, L. J. (as he then was) in *Re Bidie*, [1948] 2 All E.R. 995 at 1003.
[7] P. 47.
[8] Preface p. vi.
[9] P. 252.
[10] Preface p. xvii.

novelty and not on nostalgia for the absolute, which devotes itself to the new ways of manipulating protean particulars and not to the quest of undeviating universals."[11] Admittedly this experimental approach not only, as Frank asserts, would be peculiarly serviceable in law, but in fact has been and is at the present day. Frank's thesis would appear to assume that the lawyer should be able to overcome his attitude of regarding law as a superior father-like source of authority. Without attempting to minimize the value of the author's demonstration of the influence of child psychology on the adult, it is suggested that he fails to see that an adult and mature lawyer does not regard law as authority because it represents for him a father-substitute; he does so because it has real authority and power, the power in the last resort to hang him for murder.[12]

Frank's treatment of the judicial process is perhaps too accurate to avoid causing argument, but at the same time too kind to cause offence. His somewhat startling statement that "judicial judgments, like other judgments, doubtless, in most cases, are worked out backwards, from conclusions tentatively formulated,"[13] becomes more convincing when one realizes that for the practising lawyer the conclusion, i.e. the judgment in favour of his own client, is the major premise on which his whole argument is based. In common law countries in which the Bench is recruited from the Bar, the habits of long years in practice at the Bar cannot be shaken off overnight on appointment to the Bench. Not the least of these habits is the practice of reasoning from desired conclusions; but the judge instead of having his conclusion provided by the instructions of his clients has to seek one on the general merits of the case. When Judge Frank accepts as accurate the influence of a vital motivating intuitive sense of what is right and wrong in a particular case (referred to with less than justice as the judicial "hunch"[14]) he would seem to be rationalizing the process which takes place in a high percentage of cases in which experienced counsel can predict with considerable certainty the result of a decision long before judgment has been pronounced. Nevertheless, the author points out, the need is for judges to be reflective, to keep their minds in painful suspense until they are in possession of all necessary material for deciding the cases before them.

The unspoken premises of Frank's unconventional treatment of precedent would appear to be two which paradoxically co-exist in the United States. The first is the predominant function of courts of law within the Constitution, and the second the general disillusionment with the unworkable mass of case law, an attitude which reflects by association on the doctrine of precedent itself. Because "the law of any case is what the judge decides"[15] the law "consists of decisions, not of rules."[16] What the courts do, says Frank, is to manipulate the language of former decisions and to use legal rules and principles for the purpose of formal justification of the conclusions at which judges arrive by other means. The real reason, *i.e.*, the emotional reason, for decisions is never reported and the *ratio decidendi* of a case is not what the trial judge says, but what his successor deduces from the earlier decision.[17] It is somewhat inconsistent to assert at the same time that judges are influenced in the deciding of new cases by the possibility that they are creating a precedent for the future and thus may fail to reach a just result in the case before them. Frank's most vicious attack, however, is directed against the jury system. "The jury," he writes, "makes the orderly administration of justice virtually impossible"[18] for not only does a jury return general verdicts without giving reasons, but there is no evidence that it takes any necessary notice of the judge's directions as to the law applicable, and may thus constitute a judge of both law and fact; a judge, moreover, unsceptical of persuasive advocacy and easily swayed by influences inside and out of court having nothing whatever to do with the merits of law in the case which is being tried. In this view the author may have been influenced by the high position of the jury in the Jacksonian era in the United States,[19] an attitude of popular adjudication which is still strongly entrenched in certain states.[20]

In the second part of his book Frank deals with the attitude of such men as

[11] P. 98.
[12] Although, as the writer has tried to show in *The Judicial Review*, December, 1949, this is only one of the reasons why law is obeyed.
[13] P. 101.
[14] P. 104.
[15] P. 126.
[16] P. 128.
[17] Pp. 148-9.
[18] P. 181.
[19] See Vanderbuilt, *Man and Measures in the Law*, 113-114.
[20] Such as Iowa.

Pound, Jhering, Demogue, Wurzel and Cardozo to the basic myth of legal certainty, and concludes with his ideal example of the completely adult jurist in the person of Mr. Justice O. W. Holmes. Although Frank's theme is realism or, as he would now prefer to call it, fact scepticism (as a theory based on procedure in the trial courts with particular reference to the unpredictability as to what facts will be proved and what selected by the judge), it would be a mistake to assume on the one hand either a complete rejection of the desirability of legal certainty, or on the other rejection of all ideals as to the purpose of law in this theory. Certainty within limits is a good thing. "By abandoning an infantile hope of absolute legal certainty we may augment markedly the amount of actual legal certainty."[21] For legal idealism we may take these words of the author: "To decry, as we have done, the quest in law of the demonstrably unattainable does not mean that we advocate giving up "ideals" in law. What the law ought to be constitutes, rightfully, no small part of the thinking of lawyers and judges. Such thinking should not be diminished, but augmented. For the most part it has been unconscious; it should, as Holmes has said, be made more largely conscious."[22]

While this book has great value and interest for the English lawyer, it would seem more applicable to conditions in the United States, for it was in respect of that judicial system that the book was written to inject "so far as feasible more reason and more justice into its daily workings."[23] In the years that have passed since this book was first published, it may well have achieved more than its author believes, and it has an undoubted message of value to every English lawyer. It is of the greatest significance that the author's experience in judicial office has only served to confirm from the inside the views he had expressed while outside the judicial pale. So long as the doctrine of precedent has meaning those views will be preserved in Judge Frank's opinion in at least one decision[24] in which, sceptical even in respect of his own office, he remarked, "Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine." The English publishers are to be congratulated on making available to us this outstanding essay, particularly at a time when currency difficulties make American books almost unobtainable.

R. H. Graveson.

THE LEGISLATION OF EDWARD I[1]

Those of us who were to hear, as well as later to read, Professor Plucknett's Ford Lectures for 1947 were interested to see how he would tackle so complex a problem as the analysis of legislation in a period when the country was recovering from the wild confusion of the Barons' Wars: a period, moreover, when there was tension between the centralizing advance of the Crown, the older centrifugal forces of the upper feudality, and the rising ambitions of the under-tenants. It was not a matter of mere struggle between two interests, the Crown and the big barons: a new force had arrived, and, as a result of the Montfortian movement, was making itself articulate. Would professor Plucknett do justice to the three parties in presenting the results of Edwardian legislation? Or were we to expect an analysis on formal, conservative lines.

The answer was clear from the outset. He took (and takes here) no formal line. The legal historian's business, as he sees it, is first and foremost to interpret, from the available legislation and any other relevant sources, the social and legal structure of the country, to see in law the impact of government and society, and to show what changes were going on within the comprehensive and bewildering term of "feudalism." It is not constitutional definitions or precise formularization that he seeks, but to understand a little better than before the web of social relationships as explained in contemporary legal language; and that is one reason (there are more) why Professor Plucknett does not worry about the old dichotomy of common law and statutory law, but is content to regard common law in the thirteenth century as custom: "the various modes of legal change in the reign of Edward I were conceived (if this interpretation can be sustained) as being changes within

[21] P. 159.
[22] P. 168.
[23] Preface p. xxvi.
[24] *In re J. P. Linahan*, 138 F. (2d) 650, 652-4.

[1] *The Legislation of Edward I.* By T. F. T. Plucknett. (Clarendon Press (Geoffrey Cumberlege), 1949.) Pp. xv, 168. 15s.

the mass of fluctuating customary law." The key to the situation is the judges and advisers of Edward I: perhaps most of all Hengham and Robert Burnell, though later Bereford, C. J. had much to do with this sort of statute-making. Statutes, then, we must regard as the result, the crystallization, of experience in the courts, and the sequence Provisions of Westminster—Statute of Marlborough—Westminster I—Statute of Gloucester—Westminster II demonstrates that this experience was being reviewed, added to, revised or modified as the judges watched the actual working out of the enactments. What a thought for the (eventual) revisers of the *Statutes of the Realm!*

In a way, of course, this is a familiar position: yet never before, so far as I am aware, has the evolutionary and utilitarian nature of this legislation been so clearly presented or with such relevant learning. This is not to forget the classic historians of mediaeval English law, Maitland and Holdsworth, the former with his brilliant insight into the legal mentality of the age and the wonderful relevance of his illustrations, the latter with his massive and luminous grasp of the history of the mediaeval English land law. It is to the former that Professor Plunkett more often refers, but with a critical power securely built upon a fuller study of the Year Books (note especially his treatment of the *Quia emptores*) and upon an evolutionary view that links the judges of Henry III's later years with the expert lawyer of Edward I's later reign. This evolutionary view, if I may so express it, saves the crisis of 1258-1267 from relegation (which it recently received) to a status inferior to that of 1232-1234, and explains its more lasting social and legal importance, without making Edward I of necessity the hero of the picture. Yet we can see how much Edward learned from his early experiences of the revolutionary movement.

It was Edward's interest, after the turmoil of the Barons' Wars and the universal land-grabbing that followed Evesham, to define and delimit the private jurisdictions of the country. Where the francise-holder demurred, the king's officers, under *non-omittas,* must enter; where there was refusal to execute the precepts in the king's writs, the principle embodied in *Quo warranto* must be recognized, that all exercise of franchisal jurisdiction ultimately derived from the king. The franchise-holder must plead prescription or genuine ancient deeds. The former was really, as the author suggests, an "admission that time had run against the Crown: the king could not say, no charter, no franchise"; but what Edward had done in the period 1278-1290 was to obviate the danger caused by the recent forcible seisins of the period of the Barons' Wars, and to prevent the acquisition of franchises in the future merely on the strength of successfully assuming them. This is the burden of Professor Plucknett's Chapter "The Law and Feudalism," when he proceeds, in a full and significant section on "Lords and Tenants," to show the means by which the Lord could reinforce the decisions of his court upon his tenants and the protection which the law could give them. This involves the investigation of distress and of the counter-remedy of replevin, against which, however, the "short recent seisins" so much distrusted by the Statute of Marlborough, provided the opportunity of successful avowry. How, after Westminster II, this obstacle was overcome—by pleading the action of replevin as if it were *contra formam feoffamenti*—is one of the neatest pieces of investigation emerging here (pp. 69-70).

Chapter IV, on the Incidents of Feudalism, considers the loss of the fief for failure to do service, the practice of mortmain, and sub-infeudation, and does so through studies of the operation of *cessavit per biennium;* of the 1279 Statute by which Edward assumes the sole prerogative of amortization; and of the famous *Quia emptores.* Under the latter topic, Professor Plucknett can question Maitland's view that the "one person who has all to gain and nothing to lose by the new law was the king": he can show that the concern of the new statute for the feudal lord was quite genuine. In one of those remarkable flashes back into the past provided by local records, he can cite a Chester County Court roll of January 1260 to show how Edward may have been using his earlier experience, by pointing to a ruling of that Chester Court that "sub-infeudation for the future should not take place unless terms had been settled with the lord of the fee that sub-tenants who enter a lord's fee without leave may be ejected by them and that the device of lease and release . . . is to be checked by compelling classes to disclose their title in county court" (p. 106). The historian will note with interest Professor Plucknett's Keynesian observation, earlier in the chapter, on the commercialization of feudal

ds, "occasional bonuses to cheer the investor in seignories," and his nailing down the expression *bona fides* (in c. 6 of the Statute of Marlborough) as "well-nigh ique in English common law during the middle ages."

As feudalism worked itself out, the fractionalization of fiefs became inevitable der the English law of inheritance, which imposed male primogeniture but equal rtition among daughters. Were I a legal historian, I should find the chapter the family the most captivating of all those included here. In dealing with that ost fundamental of all mediaeval concepts, the principle of inheritance, we find bottom a conflict between what the author calls the dynastic idea of the family, garded "primarily as the chain of ancestors and descendants extending through me" and the view of it is as "a contemporary group of kinsmen." Primogeniture the natural expression of the former view, as partition is of the latter.

> "The family, so conceived, had from time to time parted with portions of its patrimony to constitute estates in dower or curtesy, in frank marriage or in tail. They were fully meant to be temporary only, the two former being for life, and the two latter enduring only so long as there were heirs of a limited class to take them. After that, the gifts came back to be united to the patrimony in the hands of the primogenitary heir of the donor. That event might be delayed for some generations, but if a gift in frank marriage had descended three times, then it became permanently detached; a new dynasty with roots and branches had come into existence, and with it a new patrimony."

But, as the history of dower and curtesy makes clear, there were people in lenty prepared to wreck this scheme, which it was the policy of Edward I's gislation (in Westminster II) to preserve at all costs. The tortious feoffment ould not be avoided "as long as seisin remained the foundation of real property w, and the exorbitant rights of husbands over the real and personal property their wives were not to be questioned until equity had given shape to an ntirely different index of ideas." The traditionalists regarded the reversion as rucial and did their utmost to maintain it: but, in point of fact, Westminster II ave a disappointing answer to the question of how long a maritagium or an entail emained inalienable. The statute was good in intention, yet, as Professor Plucknett nows, a clumsy amendment "perhaps hurriedly introduced" substituted for the ynastic view of the family the irreconcilable principle by which the gift was ermanently detached from the original patrimony after the sole interval of a life being. All the statute therefore gave was an entail inalienable during the life the first taker. The puzzle is why ever had such an amendment come to be jected into a statute so well intended. The author does not solve this problem. erhaps, among the draughtsmen, there was a conflict of principle, and some clerk ho did not believe in the dynastic idea of the family got his way; perhaps it was ist a muddle. With the last chapter, on commerce, which discusses how a creditor as helped by Edwardian legislation to recover his debts, space will not allow me deal.

E. F. Jacob.

DIPLOMATIC PRACTICE

is refreshing to find an interesting modern book on a neglected subject. The resent work[1] is as authoritative as it is fascinating: it is the first work in the ortuguese language on diplomatic practice written by a Brazilian authority who as had access to the leading foreign diplomatic representatives accredited to his ountry (p. 16, Vol. 1), and to all the works of authority (see the index pp. 318-329, ol. 2).

The first volume deals with the method of diplomatic relations, the right of gation, the privileges and ceremonies of diplomacy. There are tables of precedence r all occasions (p. 360) and a list of foreign orders and decorations, the most ncient of which appears to be the Portuguese Order of Saint Bento de Avis (1162), llowed by the Danish Order of Danebrog (1219), the Hungarian Order of the nights of the Golden Spur (1310), the Supreme Order of Christ of the Holy See 317), the Polish Order of the White Eagle (1325); the English Garter of (1384) omes sixth. The English list might perhaps have included a note on the ompanions of Honour (1917), of the Knights Bachelor (who have had insignia since

[1] *Tradato de edeito diplomático*, by Rubens Ferreira de Mello, Vols. 1 and 2 (Brazil, Ministerio das relaçoes teriors,, Serviço de publicaçoes, 1948) vi+458 and vi+351 (including index). Price unknown.

1926) and the George Cross. The Royal Style of George VI has of course been changed since this work was issued. The rigour of the British attitude towards according permission to wear foreign decorations (p. 444) does not seem to be unfairly criticised.

There is a very useful chapter in Book 1 of the first volume dealing with the organization of and qualifications for entry into the Foreign Office in Brazil and in the principal countries of the world. The author observes (p. 119, note (1)) that it is most difficult to find what the position is in the U.S.S.R., since the officials who give any such information are liable to penalities of from 6 to 12 years of forced labour. It is interesting to see that our own Foreign Office does not apparently require a knowledge of international law for entrants (p. 107), though this is not the case in Brazil (p. 71) or in the U.S.A. (p. 92). In this matter we venture to think that America is right. International Law and organization should surely be a compulsory subject for all prospective entrants for the Foreign Service, and not merely an option along with subjects like classics which should have been learned at school, and which cannot compare with international law in relevance to the diplomatic career. Such a requirement would strengthen the study and teaching of public international law in this country which tends too often to be an option in a degree course, and is consequently neglected by too many English students.

Chapter V of Book 1 is an interesting account of the qualities desirable in an ambassador: he is not to "lie abroad" even for the good of his country and he must avoid all corrupt methods: the chance of the loss of his colleagues' respect and of that of the government to which he is accredited, should be a deterrent (p. 149).

Books 2 and 3 deal with diplomatic action. At p. 274, it is hinted that perhaps Great Britain is too lavish in according diplomatic protection to nationals and foreigners on the outer fringes of embassy: on the other hand the author cites precedent to show that even ambassadors passing through third states in the course of their peace-time duties should be immune from suit if they conduct themselves properly (p. 277). The pages dealing with the hardships imposed on diplomats in invaded France (p. 328) and in Axis countries during the recent war make instructive if depressing reading (pp. 278-281): and so does the growing tendency to restrict diplomatic secrecy in time of war (p. 284).

As is customary in South American works, the right of diplomatic asylum "franchise de quartier" receives full treatment (Book 3, Chapter V): its origin is traced back to Genesis 16, 17! Its regulation in Latin America, where the practice is fully developed, is based on treaties (p. 314): though it is observed that the creation of recent types of war crimes may well affect the institution (p. 311).

Volume II gives very full practical information about the organization of diplomatic gatherings of various kinds, and about the business of treaty making. Incidentally, very wisely in our view, the "full powers" of a Brazilian treaty makes contain a reference to the need for congressional ratification (p. 44 and p. 202). There is an interesting account of the curious way in which the Atlantic Charter was agreed at p. 52, note (2). The practices of different states with regard to ratification of treaties are set out in Chapter II.

Chapter III deals with peaceful settlement, and Chapter IV with the different types of international organizations which proliferate today. We should have liked to see a little more about the operation of the veto (p. 114) in the Security Council, and some reference to the fact that even one of the "Big Five" cannot vote on the peaceful settlement of a dispute to which it is a party.

The Diplomatic Formulary (pp. 149-229) is a valuable source of precedents, and the appendix contains, in Portuguese, versions of Brazilian, Latin American and United Nations Documents. The Bibliography is very full and exhaustive, though the reference to the Annual Digest and to Oppenheim could have been to the more recent editions; and perhaps a reference to Hackworth's large work, and to the papers of the Grotius Society of London might have been included.

We have read this work with pleasure and profit and see in it a real and valuable contribution to an important topic of international law. Throughout the author's style is clear and pleasant, and his views are never overstressed or immoderate. This is a book on diplomacy by one who is clearly a diplomat of unusual experience. We shall watch with interest the development of the new Institute of International Studies at Rio Branco. We should like to see some English students received there in the interest of international and academic solidarity. We should certainly be glad to see some students of the Institute take

the diplomas in International Law offered by some English Universities, including, quite recently, Manchester University.

B. A. Wortley.

LAW DICTIONARY

This extraordinarily expensive and not very long book[1] is a by-product of the Nuremberg Trials. It is produced on a new and very sensible plan, namely that of giving in the first place Spanish, French and German equivalents for English words and phrases, each of which is numbered, and then giving three separate indexes, in which a person who looks up a Spanish, French or German word or phrase can find the numerical reference which will lead back to the main dictionary. I have made some slight use of the book, and found it fairly useful, though I have much doubt whether it may not prove to be a snare for the unwary. One rarely finds exact equivalents in one language for the legal terms of another, and the safest way in which to find out an equivalent is to go to a foreign law book and find the term in its context. In other words the real dictionary for French private law terms is a book such as Planiol's *Traité Elémentaire*. However, no doubt a legal dictionary is useful in order to put one on the right track. I have noticed one or two entries which cause me some surprise; for instance the common tendency to confuse *damage* with *damages* has led to the total omission of the former term, and a lumping together under the same entry of *dommage, dommages-intérêts,* and *dédommagement*. The incautious reader who had no knowledge of French law might not realize that only the last two of these terms are translations of the word *damages,* while the first of them represents *damage*. I notice also a number of rather curious omissions, for instance the word "private"—surely a very important legal term—does not occur at all, and the same is true of what is perhaps an even more important one, "thing." It was also difficult if not impossible to find a number of important verbs, such as "prevent," "suffer" and even "buy." However one incidental virtue of the book is that there is plenty of room on each page to add new entries and one can also use it in order to build up legal dictionaries for other languages, such as Russian.

F. H. L.

INTERNATIONAL LAW

This is a much better book than the 1st edition. It is described as "extensively revised and enlarged," and fully lives up to the description. A short historical section has been added at the beginning and one of the most serious defects of the 1st edition has been remedied by the addition of a chapter on International Institutions. These and other additions have considerably increased both its size and its usefulness. Particularly welcome is the disappearance of the demoralizing reiteration of a heading followed by a statement that the topic lay outside the scope of the book. In these places there now appears a summary account with, usually, an indication of where further information may be found. The references to other literature are in fact more liberal than before throughout the book, and there is a short Note on Bibliography at the end. Many gaps have been filled.

It is perhaps impossible to satisfy every reader. Thus a short account of the "Continental Shelf" has been added, but there is no reference to the other contemporary doctrine of the "Sector." Again, the judgment of the Nuremberg Tribunal is now cited, but is cited as law without any indication of the doubts which have been cast on the legality of the Tribunal by e.g. Kelsen in 1 I.L.Q. 153; (the same author's article on the Security Council in 2 I.L.Q. is also not mentioned). Finally, a small point: it is misleading to say (p. 181) that " a great number of states, including Great Britain," signed the Brussels Convention of 1926 on Government Vessels which "came into force in 1937," without also saying that only a small number of states, not including Great Britain, has ratified it.

Barry Nicholas.

[1] *Law Dictionary: English—Español—Français—Deutsch.* By Lawrence Deems Egbert. (New York: Fallon Publications.) Price £7 10s. net.

An Introduction to International Law, by J. G. Starke, 2nd edition. (London: Butterworth & Co., 1950.) pp. xvi, 397. 27s. 6d.

INTERNATIONAL LAW

It was only in 1947 that the 6th edition of the first volume of this treatise[1] was published. It was reviewed by Sir Arnold McNair in vol. xxx, p. 101, of this Journal. The widespread demand for the book and the rapid march of events have called for a new edition. Professor Lauterpacht in the preface of this edition, with commendable frankness, suggests that the 6th edition will remain a serviceable instrument of study and reference, while only libraries may attach importance to possessing an up-to-date edition. But in fact, apart from additions to the bibliography which are apparent on almost every page, there is much new material of importance, particularly in the sections dealing with the organization of the United Nations. It is therefore a considerable achievement that Professor Lauterpacht has, by the elimination of older authorities, not exceeded the number of pages in the corresponding volume of the previous edition. The organization and jurisdiction of the International Court of Justice is not, however, dealt with in this volume; but will be discussed in a new edition of vol. II, which will be eagerly awaited by students of International Law.

N. S. Marsh.

CRIMINAL JUSTICE

It was, no doubt, a great temptation to the editors of the Journal of Criminal Science to devote their second volume[1] to a symposium of the Criminal Justice Act, 1948. But the results unfortunately show that this temptation should have been for the present resisted. After all, none of the Act had at the date of this publication been in operation for two years, and much of it for little over one. The important new penal institutions, attendance and detention centres, existed only on paper; none of us had (or has yet) sufficient working experience of the recast probation system and its new rules to enable us to decide whether it works as well, as, better or worse than the old. It is far too early yet to assess the value of corrective training or of the new style of preventive detention.

It is for this reason that most of the articles, in spite of the distinction of their authors, are somewhat unsatisfying. When they are confined to the brief they consist, and can consist, only of a recapitulation of the sections of the Act; where they go beyond it, only too often it is to retread paths already charted by the same or other authors under the same ægis—that of the Cambridge Department of Criminal Science. Thus "The Criminal Justice Act and Prison Administration," by the Chairman of the Prison Commission (pp. 1-22), insofar as it does more than list the changes imposed by the Act on the existing system, only chronicles again history already covered by various essays in earlier volumes under the same editorship—namely "The Prison System," by Mr. John Watson in "Penal Reform in England" and the "English Prison System," by Professor L. Radzinowicz in "The Modern Approach to Criminal Law." What we really want to know, that is, what regimes are contemplated for attendance and detention centres and for corrective training, is not explained at all.

The same kind of reduplication is also apparent in the "Historical Background" portion of Dr. Grünhut's paper on "The Treatment of Persistent Offenders" (pp. 65-76) for this was beautifully dealt with by Miss Craven (The Trend of Criminal Legislation) in "Penal Reform in England." Another kind unfortunately mars the reader's pleasure in Sir Norwood East's essay on "Medical Aspects of the Criminal Justice Act, 1948" (pp. 90-125), for so much of it is almost exactly what he has already written in other essays very recently collected and published by The Stationery Office under the title "Society and the Criminal."

The complaint that this has been permitted is made against editorial policy and not against the contributors. It is a singular disappointment to have to voice it after the good start of the Journal (welcomed in the course of a previous review in these columns) and not to be able to find much to put on the credit side. Though Mr. Catteral Jolly's article on "Changes in Criminal Procedure" (pp. 126-159) is a delight to read because of its clarity both of style and arrangement and its accuracy it is confined almost entirely to a recapitulation of the Act, as are Dr. Margery Fry's "The Effect of the Criminal Justice Act on the Borstal System" and much

[1] Oppenheim, *International Law*, vol. 1, Peace, 7th edition. By Professor H. Lauterpacht. (London: Longmans, Green & Co., 1948.) pp. liii, 946. £3 10s.

[1] *The Journal of Criminal Science*, Vol. 2. A Symposium on the Criminal Justice Act, 1948. (Macmillan & Co. Ltd., London, 1950.) 18s. net.

of Dr. Coddington's "The Probation System under the Criminal Justice Act." One cannot help believing that any likely readers of the Journal of Criminal Science would be familiar with the provisions of the Act and therefore the purpose of the publication of these articles seems obscure.

Dr. Coddington's article is, however, followed by an Appendix in which he displays many of the fruits of his long experience of using probation. It is infused with great practical wisdom and humanity. This taken together with the two concluding essays (in French) by Professor Logoz (of Switzerland) and M. Magnol (of France), each dealing with some aspect of intent in their respective penal codes, just redeems the issue from unrelieved dullness. The editors do not account for the absence of a third article, promised for this number in their editorial note to the last, by Dr. H. Edelston, Director of the Bradford Child Guidance Clinic.

It is to be hoped that the editors will extend the experiment in the comparative field but also that they will not be misled by their own versatility. We are not as a nation very good linguists and much lively continental writing is barred to us by the language difficulty. This handicap is never laid upon the readers of the *Revue de Science Criminelle et Droit Pénal Compare,*[2] of which the last three numbers for 1949 and the first for 1950 are now to hand. This magnificent quarterly draws its contributions from all over the world but publishes them all in French, whatever the language in which they are originally written. Messrs. Radzinowicz and Turner might follow this precedent in future.

The Revue has also been noticed in these columns before, and enthusiasm for it grows. Incidentally the small concession of cutting the leaves mechanically before publication will be greatly welcomed by those many readers who have not the French facility with a paper knife. In these numbers there are two most interesting articles on analogy in criminal law; one, comparative in treatment, translated from the Spanish of M. L. J. de Asua (1949 pt. 2, p. 187) and one confined to a consideration of analogy in Danish law by M. S. Hurwitz (1950 pt. 1, p. 1). These are of particular interest to English practitioners who have no experience of working under a code and who may have mistrusted the occasional use here of analogy to extend the bounds of criminal conduct, as in the sphere of public mischief. To classical Continental systems such a process is anathema. As M. de Asua writes (p. 199) "But for some exceptional opinions . . . analogy is rejected by our rules . . . The reason is that where the law wishes to impose a sanction on any given conduct it so decrees in the text (of the code) and catalogues the punishable acts. Cases which are not included are not within the sanction, not only because they have not been foreseen as delictual, but because it is presumed that the law does not wish them to be punishable." This pleasant principle of "nullum crimen, nulla poena sine lege" is distressingly absent from the contemporary penal code of Soviet Russia. M. Jean Graven's magnificent panorama of this system is concluded by the third instalment printed in part 2, 1949. It is necessary to repeat that this is a major contribution to comparative criminal law. Its lucidity and complete objectivity heighten the sinister and terrifying picture of a code which has been framed to make the rights of the state paramount in a vast empire in which the state means a handful of brilliant and ruthless men who lack any of the refinements of a liberal ethic and all bowels of human compassion. The Journal of Criminal Science would confer great benefit on us if it could devote all or part of a future issue to publishing this masterpiece in translation, together with some commentaries upon it. Even fellow travellers would fail to make palatable some of the analogies to sabotage defined, adopted and fearfully punished by the Russian Tribunals. The best antidote to a taste for the Soviet system is undoubtedly a dose of facts.

Another paper of immediate interest is by M. Jean Pinatel and appears at p. 705, 1949, part 4. It is an examination of the various ideas currently held of the science of penology; these seem to the learned author to classify themselves roughly into two schools. One considers that penology is merely a science concerned with the management and reform of penal institutions, the other that it is concerned first, if not exclusively with the management of the individual delinquent. Reading these conclusions with a side glance at the Criminal Jusice Act, 1948, makes for a realization that the English genius for compromise is still well alive.

Criminal psychiatry seems to have made even greater strides in Scandinavian

[2] *Revue de Science Criminelle et de Droit Pénal Comparé.* Librairie du Recueil Sirey, Paris. Parts 2, 3 and 4, 1949 and Part 1, 1950. No price quoted.

countries than here. In the course of a translated article on this subject (1949, pt. 3, p. 513) Professor Olof Kinberg writes: "First of all one must get rid of the dogma that a sanction is necessary. We in Sweden hope that the time is not far off when we shall abandon even the idea of punishment"—a hope that is perhaps permissible if it is true, as this authority thinks, that the vast majority of criminal offences are due to mental abnormality. It is doubtful if this belief is widely held here; certainly not by the most responsible psychiatrists, including Sir Norwood East.

M. G. Heuyer's article on "Narco-analyse et Narco-diagnostic" (1950, pt. 1, p. 7) is both erudite and entertaining. The press has been much attracted by the "truth drug" and accorded it its full news value. It is therefore pathetic to discover the narrow limits, apparently admitted by experts all over the world, to the usefulness of the method and to read "the journalist or the psychiatrist who invented the term truth drug created a legend which attracted an undeserved audience. There is no truth drug, and therefore no reason to fear that analysis under narcotics could be profitably employed in the preparation of a prosecution." Authors of whodunits should note this.

There is no doubt that this is a most lively and valuable quarterly which should be in every law library. If it is not (and it is said to be hard to obtain in this country) we are the losers.

E. R. Guest.

PHILOSOPHY OF LAW

The second booklet[1] of Professor Goodhart is also an amplification of a lecture which deals with the special contribution of English Jurists and Judges to the Philosophy of Law. The lecture was given to the Association of the Bar of New York, on a foundation in memory of Justice Cardozo; and it is a masterly summary of the English principles of legal philosophy from the days of Bracton and Coke till today. It stresses the practical and empirical character which is the result of the principles of the Common Law. The English legal mind runs away from theory and the logic of thought. It is concerned with the logic of facts and with the development of the law from precedent to precedent to meet actual needs. The lecture consists indeed in large part of apt quotations from the writers and the judgments of the Courts. But they are put together with an admirable art and with an engaging sense of humour.

Professor Goodhart concludes that the English legal philosophy has taught us "that the Ruler is bound by the Law, that government is a trust for the people as a whole, that Law must be a compromise between conflicting interests, and that the proper interpretation of the Law depends not on abstract conceptions, but on a wise judgment which does not forget that it is concerned with the lives of ordinary men." This philosophy has played and will continue to play an important rôle in the world of ideas.

Norman Bentwich.

CRISIS OF POLITICAL THEORY

Under the auspices of the Mexican Bar Association a number of Mexican scholars in the fields of legal theory and constitutional delivered a series of lectures on the "crisis of political theory" which are collected in the present volume[1]. Professor Gaxiola whose lecture opens the series argues that recent events have virtually eliminated Fascism from the field of struggle and that liberalism and communism are the only survivors. Both are in his view undergoing a deep crisis. At the time when Professor Gaxiola was writing this was perhaps not as obvious as it is today after the emergence of Titoism as a separate force and a danger (within limits) to the communistic ideology from which it claims to stem. The crisis of liberalism in his view is due to the problem of the masses which nobody has seen more clearly and described more eloquently than Ortega y Gasset. He follows Carl Friedrich in suggesting that this crisis can only be overcome by "constitutionalism" which in his view is the only manner of reconciling the two "desiderata of humanism, liberty and equality" which in the past have appeared as incompatible. The high level of this lecture is maintained in all the other contributions with the sole

[1] *English Contribution to the Philosophy of Law.* By Arthur Goodhart. (Oxford University Press, 1949.) pp. 44. 5s.

[1] *Ilustre Y Nacional Colegio de Abodados de Mexico.* Academia Juridica Seccion de Derecho Constitucional. Crisi del Pensamiento Politico. Ciclo de Conferencias de 1946. Mexico. Inpresario Barrié, S.a. iv+196 pp.

exception of the last, which is little else but a rehash in somewhat laudatory language of the entire course. The Mexican Bar Association has no doubt done well to publish this series of stimulating and instructive contributions which make a most attractive reading even where they do not fully convince or merely repeat what has been said before by others.

E. J. Cohn.

SWEDISH INTERNAL LAW

Scandinavian lawyers, although they often obligingly write in English on Roman Law, International Law and Jurisprudence, usually, for obvious and good reasons, use their own languages when writing about their own internal law. Thus a book on Swedish Law written in clear, precise and not unattractive German is very much to be welcomed here; for many more Englishmen read German than Swedish. This book[1] contains lectures addressed to a group of German students from the University of Münster by members of the Lund Faculty of Law. The underlying purpose is to show how a Northern democracy can make things work; and the topics dealt with are Constitutional History; the present structure of Swedish public life, with special reference to political parties; Constitutional organs of control and guarantees for the security of law; Freedom of the Press; Law and economic policy; self-government in the labour market; the Northern legal tradition and its vicissitudes in Finland; the sources of Swedish law; some principles of the Swedish law of contract; parent and child in Swedish law; economic associations; the reform of the Swedish law of procedure; and modern policy in relation to crime in Sweden. Almost all the lectures are intensely interesting, especially, to my mind, those which describe the extraordinary development of economic associations of producers, employers, workmen, etc., which seem to have established a strong internal discipline among their members, something like a monopoly in each field, and at the same time to have maintained almost complete freedom from control by the State. Such a system could obviously work only in a country with very old traditions of self-government, interrupted only for short intervals at the ends of the seventeenth and eighteenth centuries respectively. Indeed one feels that one is being introduced to a form of legal life which, though it keeps windows open to the outer world, is none the less curiously self-contained: thus Swedish parliamentarism must be the only one in the world that owes hardly anything to England.

F. H. L.

THE INSTITUTIONS OF PRIVATE LAW

This[1] is the first English translation of Karl Renner's book. Renner was concerned to show that legal rules are not simply the reflex of economic forces; that they react upon those economic forces and, while remaining unchanged, set up a tension which ultimately legislation must resolve. The problem is, as Dr. Kahn-Freund puts it, "the functional transformation of the untransformed norm"; and in particular the relationship of the unchanged concept of property to the very changed conditions of society in 1600 and 1900. The change is one from an idyllic age of small peasants, whose legal ownership of land and goods corresponded to the economic facts of user and enjoyment, to a wicked age of capitalism in which the important concept is no longer ownership, but the multitudinous contractual relationships which all but engulf it—the managerial revolution has arrived—where once *res* included *obligatio, obligatio* swallows *res*.

Renner set himself to show by examples how this had happened. His editor confesses that the book shows signs of age. For two reasons: firstly, Renner's positivism was "a jurisprudential reflection of the age of liberal capitalism" in which legal norms were believed to be relatively stable. Secondly, the facts have changed. 1900 was the high day of competitive capitalism; in 1950 we endure monopolism from capitalist and socialist alike. Yet Dr. Kahn-Freund suggests that there is still value in the book. "It is as true today as it was 50 years ago that legal institutions may thoroughly change their social function as a consequence of a transformation in their environment. It is also true that the legal profession is apt to ignore this process." (p. 38). This last sentence sets the tone for much of the Introduction and many of the Notes. These notes are spread all over the book, and this is not an

[1] *Einführung in das schwedische Rechtsleben.* (Lund: C. W. K. Gleerup, 1950.) Pp. 194.

[1] *The Institutions of Private Law and their Social Functions,* by Karl Renner. Edited with an Introduction and Notes by O. Kahn-Freund, LL.M., Dr. Jur. (London: Routledge & Kegan Paul Ltd., 1949.) Pp. viii, 307, 25s.

attractive method; yet they are highly suggestive and display a remarkable range of reading. But there is always an insistence that the law is a laggard in the rear of social progress. Dr. Kahn-Freund admits, when instancing the development of S.G.A.s.14(1) and the law of negligence, that judicial casuistry in this country has succeeded in some measure in avoiding this reproach; but he sees in the "ticket" cases a monopoly imposing on the individual under the guise of outmoded contract: yet does the result do as much injustice as he assumes? Can the law legislate for the blind and illiterate; and does not the active competition of road and rail in the matter of price make the buying of a ticket a very real instance of contract as traditionally understood? In the same way, does not the criticism of the *Fairman* case (p. 167) as "little short of disastrous" press too far the analogy between large "properties" and a public utility in the strict sense? Meum and tuum is not altogether dead.

It is this approach which leads to the editor's note on the same page—"How much understanding for the changing function of the law do our students—whether university, bar, or law society—derive from their training in contract, tort, and real property?" Dr. Kahn-Freund cannot mean that political indoctrination should be a part of legal studies; the only other meaning is that students should be taught that times have changed. At the risk of digression a comment suggests itself. If the undergraduate reading law occupied his waking hours exclusively in the study of law in books, there might be cause to believe—as we are so often pressed to believe today—that what every law student needs is a course in politics, economics, sociology and psychiatry. But this is not the case. In one university at least the undergraduates spend some considerable time in purchasing (on credit) goods to which S.G.A.s.14(1) applies; in driving vehicles against which the law of negligence is, sooner or later, applied; and (after that application) travelling perforce on transport for which tickets are issued. They are sadly aware that "times have changed."

G. D. G. Hall.

FRENCH CIVIL LAW

A comparison of this edition[1] with the first edition, published in 1934, shows many changes, many of them due to the large output of important decisions in recent years. But it is characteristic of the thoroughness or the re-editing that quite a number of the older cases have been omitted and many older cases introduced to take their place. Those who possess the older edition would therefore be well advised to retain it. For those who are unfamiliar with the book it may be as well to say that for each case there is a head-note, a statement of the facts—except where they appear sufficiently in the judgment—a transcript, complete on all relevant points, of the judgment, and finally, "observations" on the case, setting it in its environment, criticising it and referring to other cases and the main juristic literature on the subject. The collection is intended as a supplement to Colin and Capitant's well-known *Cours élémentaire de Droit civil français,* and follows the same order.

The conciseness of French judgments has allowed the editors to include no fewer than 240 cases, with hardly any abbreviation. Even so an English reader would infer that they are spread rather thinly over the ground, after the manner of *Smith's Leading Cases* or *White and Tudor* rather than of the modern type of student's case-book. This is true enough, though where the law depends almost entirely on decisions, as in the law of torts, it is hard to see what else could be needed. Moreover, it must always be remembered that French civil law is based on a code, and where the code states a principle clearly there is no need to print a decision which merely registers an obvious interpretation. However, even a short acquaintance with the contents of this book will show how much modern French civil law has owed for its development to the courts, and a prolonged study will give a view of the law in action which cannot be obtained even from the admirable text-books which are such a feature of French legal literature. It is a book that should certainly find a place in every university or college law library. If an English lawyer may be allowed one criticism it is that in very many, if not most, instances, nothing would be lost if the head-notes were omitted. They take up a great deal of space and are usually mere extracts from the judgments which follow; and since the latter are rarely long, the head-notes do not materially help the reader to see the point of the case.

F. H. L.

[1] *Les Grands Arrêts de la Jurisprudence civile.* Par Henri Capitant. 3rd edition. Par Léon Julliot de la Morandière. (Paris: Librairie Dalloz, 1950.) Pp. xii, 727.

FRENCH CASE LAW

THE appearance of these two little books[1] is evidence that both the French student and the French practitioner feel the need of short collections of their case-law, to dispense them from the necessity of constantly referring to the great collections of reports. Such collections are of peculiar value in public law because, as is well known, the general principles of *Droit administratif* are entirely the creation of the *Conseil d'Etat*, and have never been formulated in a Code. Much too of the more interesting parts of Constitutional law is hardly reflected in the Constitution; and declarations of rights mean little until they are interpreted. Although these little books are useful, perhaps more useful to English readers than to French lawyers, who usually have the Reports within reach, they are unfortunately rather disappointing. The compiler seems to have tried to include too many cases, with the result that his statements are excessively brief. Very often it is impossible, at least for a foreigner, to see what is the exact point of a decision; and this is usually because the facts are inadequately stated. The style of French judgments is terse and obscure enough in all conscience to warrant reprinting in full, and even amplification. It would seem that there is room for a compilation on a fairly large scale of French cases on public law, comparable to that published for Civil Law by Henri Capitant.

These books being what they are, it is perhaps dangerous for an English lawyer to moralize on their contents: he is likely to misunderstand for lack of detail. However, one is apt to lose some of the respect one has been taught to have for *Droit administratif*. Far too many of the cases here described turn on conflicts of jurisdiction between the civil and administrative courts, and yet the principles of the two branches of law seem to be growing very much the same. Again, there seems to be a feeling, in spite of what we have been taught in the last generation, that the civil courts can be better trusted to protect the liberties of the citizen than the administrative courts. Finally, many of those who complain of interferences here with liberties of one kind or another would be shocked at the inherent police rights which are recognized as a matter of course to belong to Prefects and Mayors. Unfortunately the compiler does not bring out the strong tendency which is now noticeable in the *Conseil d'Etat* to decide cases on formal grounds and to refuse to deal with the merits, on the ground that questions of *opportunité* concern only the authorities to whose discretion they have been committed. It is clear that one of the most pressing tasks for the comparative lawyer is a detailed comparison between French and English Administrative Law.

F. H. L.

GERMAN LAW

THIS work[1] was prepared to provide members of the British staff in the British Zone of Germany with an elementary guide to German Law. It is perforce—though with proper expressions of regret—confined to a description of the law in force in the British Zone, though occasionally references are made to the law of other Zones. A second volume is to comprise Criminal Law, the Law of Civil and Criminal Procedure and Private International Law.

Most of the present volume is by Dr. E. J. Cohn, the sixty pages on Commercial Law by Dr. Martin Wolff. Only one possessing much greater knowledge of German Law than I have dare presume to criticise the learning and expertise of such outstanding authorities. It will be more to the point to describe the methods they have adopted and the assistance that English lawyers, whether practising or academic, can hope to obtain from their work.

The General Introduction, besides giving brief accounts of such necessary introductory matter as the general character of German law, its history, technique, sources and literature, also describes the intricacies of the present political organization of Germany and the highly topical subjects of Nazification and Denazification —here it must be emphasized that the book describes conditions in force in 1948, and accordingly much of the material which is of mainly temporary interest is already out of date. That is certainly not true of the greater part of the Introduction, which seems admirably fitted to start the beginner in German Law on his path.

[1] *Recueil de Jurisprudence en Matière administrative.* Par Pierre Souty. 4th edition (Paris: Editions Domat Montchrestien, 1949.) Pp. 131. *Recueil de Jurisprudence en Matière constitutionnelle et de Libertés publiques.* Par Pierre Souty. (Paris: Editions Domat Montchrestien, 1950.) Pp. 143.

[1] *Manual of German Law:* Vol. 1: *General Introduction, Civil and Commercial Law.* (H.M.S.O., 1950.) Pp. xxvi, 297. £1 5s.

It is free from pedantry, and could only have been written by one who is thoroughly familiar with both German and English Law and is aware of the sort of questions that an English lawyer is likely to ask about a foreign legal system.

In some respects the task of describing German Civil Law is an easy one, much easier than that of describing the corresponding portions of English Law. There is, for instance, a recognized order of exposition determined in advance by the structure of the BGB (*Bürgerliches Gesetzbuch:* Civil Code); and although the Code has been modified and added to by subsequent legislation and by judicial and juristic interpretation, the problems of arrangement are not very difficult. They are perhaps less difficult than in French Law, since the order of the BGB is much more perspicuous than that of the Code Civil. But the danger with so articulate and coherent a system as that enshrined in the BGB is that, as with a philosophical system, if one does not get the hang of it one may not be able to make head or tail of any of its rules. Accordingly there is a very definite obligation on the expositor to adjust his approach to that of the ordinary English lawyer who is content with the rather disorderly content of his own law. I think Dr. Cohn has done this very well; though I am perhaps not a very good judge. I can at least say that he has enabled me to fill in satisfactorily and with very little trouble what was previously a very sketchy knowledge of German Law. Dr. Cohn has taken the utmost pains to explain the Chinese box arrangement of German Civil Law, under which anyone trying to find the law on a single topic may find that he has to look not only at the rules which apply specifically to it, but to the general rules applicable to the genus of which it is a species, and even to the General Part of the Civil Code, which contains the widest generalizations which the nineteenth century Pandektists, and after them the compilers of the Code, have been able to frame. Of course anyone enquiring into a problem of the English Law of Sale may have to refer to the general law of contract, but with us the process of generalization has gone nothing like so far as in Germany. Dr. Cohn has always kept this difference in mind. He has also been careful to illustrate all difficult points by examples, frequently by examples which seem at first sight bizarre to the English lawyer. He thus gives his work an arresting character. It goes without saying that he does not limit himself to the BGB itself, but incorporates in his account, not only later legislation but also the separate enactments, such as the Grundbuchordnung, a study of which is so necessary to an understanding of German Civil Law. Moreover he regularly mentions cases where a particular institution, though it appears in the texts, is not in use. Thus the treatment is eminently practical and should be of great use to English lawyers who have to state a case for the opinion of a German lawyer and to understand his opinion when they have received it. At this point it is worth mentioning that the book contains not only a good index, but also an alphabetical list of German terms, with references to the body of the text. This is a much more practical expedient than a legal dictionary.

The account of Commercial Law given by Dr. Wolff is, like German Commercial Law itself, very much in the nature of a supplement. In some ways it is even more interesting than the account of Civil Law; for it is largely a description of devices, many of them hardly familiar to English lawyers, which Germans have used in business, some of them organizations, like the curiously luxuriant growth of various kinds of companies and partnerships, others typical transactions or instruments such as the Kommissions or Speditionsgeschäft, or the functions performed by the Handelsmakler, or the various operations connected with banking. All of this is handled in the most plastic manner, with constant references to the practical ends aimed at, including the fiscal aspect. After reading Dr. Wolff's account one has the feeling that one has learnt, not only a great deal of commercial law, but also much of the business background without which it hardly has a meaning.

In short, this is an admirable book, and one to be read through, not merely referred to. May the second volume follow it without delay.

F. H. L.

NEW TRENDS IN ENGLISH DEMOCRACY

M. Paul de Visscher came to England in 1945 to study the modern working of the British constitution. His admirable little book,[1] *Les nouvelles Tendances de la Démocratie anglaise,* is largely devoted to our problems of delegated legislation. In

[1] Paul de Visscher, *Les nouvelles Tendances de la Démocratie anglaise.* (Collection "Levanium.") (Tournai-Paris: Casterman, 1947.) Pp. 212.

countries possessing a written constitution these are, he observes, problems of the interpretation of texts; in Britain they are the phenomena of a trial-and-error evolution. After a judicious examination of the supremacy of Parliament (which some of our modernists no longer take for granted), the separation or interdependence of powers, Montesquieu, the Donoughmore Committee's report, the history, technique and characteristics of subordinate legislation and the possibilities of judicial and parliamentary control, he has an important chapter on the Second World War and the system of crisis legislation or *pleins pouvoirs*. Before he comes to his final ten pages of "conclusions" there is another good chapter on the approach to constructive democracy.

We have it on Bacon's authority that lookers-on often see more than the players. This continental observer has some shrewd comments. Time, he finds, has falsified the opinion expressed by Ilbert (in his *Legislative Methods and Forms* in 1901) that English public opinion would never tolerate the equivalent of the French *décrets-lois*. Opinion in Britain, he says elsewhere, accepted the *pleins pouvoirs* of 1914 as an exceptional and temporary method of making laws, a sort of parenthesis in our constitutional story. If the abnormal and temporary has now become the usual and permanent method, it is because the English will put up with anything to which habit has accustomed them. Speaking of *The New Despotism*, he remarks that, as violent and even partial statements are needed to stir our apathetic countrymen, the critics of that piece of judicial pamphleteering can now, when the storm is over, congratulate themselves that the book was written and that Lord Hewart wrote it. When he comes to the 1939 Act, authorizing His Majesty to make such regulations as appear to him to be necessary for the public safety and the defence of the Realm, M. de Visscher notes the significance of the words "to him." He expresses surprise at the passions aroused by the General Election of 1945, after the repression and unity of the previous five years. Flattering perhaps the cerebration of British voters, he declares that the electorate gave its verdict in favour of a planned economy, and he rightly insists that an interventionist philosophy inevitably stimulates delegation.

There are few passages in his book which justify challenge. To those who think that delegation has got out of hand he seems inclined to attribute the belief that Parliament should have a monopoly of law-making. Does any English critic so believe? Dicey certainly did not, nor would the oldest-fashioned Liberal or Tory in Dicey's university. The dispute is over the respective shares of parliamentary and subordinate legislation. In mentioning the Act of Indemnity which in 1944 closed the incident of the Home Office's failure to lay the National Fire Service Regulations before Parliament, he treats the passing of the Act as an admission that the failure had invalidated the regulations. This was not the official view here, and the Act itself is careful not to say it. If default in laying invalidated the regulations, at what moment did they become invalid?

A postscript to the book enlarges on the activities of the Select Committee of the House of Commons which has the duty of scrutinising Statutory Instruments. Maybe, like other commentators, he tends to overestimate the Committee's work. He seems disappointed that the Committee has not amplified its jurisdiction. Whether or no this reviewer can share those regrets, he can cordially commend M. de Visscher's book as one which is based on solid and careful research and is easy and profitable to read.

C. T. C.

The following publications have also been received:—[1]

Affaire du Détroit de Corfou—arrêt du 9 avril, 1949. (Soçiete Egyptienne de Droit International, July, 1949.) Pp. 42.

Alfaro, Ricardo J. *Report on the Question of International Criminal Jurisdiction.* (New York: United Nations, 1950.)

Annuaire Suisse de Droit international, 1948. (Zurich: Editions Polygraphiques, S.A., 1948.) Pp. 286. Swiss francs 20.

Ausländisches und Internationales Privatrecht. 15 Jahrgang, 1949. Heft 1 (Berlin: Walter de Gruyter, 1949.) Pp. 188.

Barbados, Proclamations, Orders and Regulations for the Year 1946 *with Index.* Pp. 202.

[1] Mention here does not preclude review later.

Ballis, G. *Studies on the Civil Law in Force.* (Athens: Hellenic Institute of International and Foreign Law.) Pp. 570. 1938.

Ballis, G. *The Law of Real Property.* (Athens: Hellenic Institute of International and Foreign Law, 1950.) Pp. 618.

Bailey, Sydney D. *Constitutions of the British Colonies.* (London: Hansard Society, No. 9.) Pp. 52. 2s. 6d.

Beckett, Sir Eric. *The North Atlantic Treaty, the Brussels Treaty and the Charter of the United Nations.* (London: Stevens & Sons, 1950.) Pp. viii, 75. 10s. 6d.

Bentwich, Norman, and Martin, Andrew. *A Commentary on the Charter of the United Nations.* (London: Routledge and Kegan Paul, 1950.) Pp. xxvii, 239. 18s.

Bialet, Augustin Diaz. *El Derecho romano en la Obra de Vélez Sársfield.* Volume II. (Argentina: Imprenta de la Universidad Cordoba, 1950.)

The actual process of codification is so important and yet is often left in such obscurity that this remarkable thorough study of the work done by Vélez Sársfield in producing the Argentine Civil Code of 1869 is very welcome. The author has worked systematically through the various manuscripts left by the codifier relating to book 1 of the Code, and has shown the debt owed by him, not only to the Roman jurists but also to such mediaeval jurists as Baldus and to the Codes of contemporary Europe. It is most interesting to see the successive versions that commended themselves to him.

Bonner, S. F. *Roman Declamation in the Late Republic and Early Empire.* (Liverpool University Press, 1949.) Pp. viii, 177. 12s. 6d.

Brœkhus, Sjur. *Ishindunger Ved Reisebefraktning.* (Goteborg: Reprint No. 3, 1950.) Kroner 4. Pp. 48.

Camerlynck, G. H. *Code Civile de l'Union Française.* (Paris: Librairie Generale de Droit et de Jurisprudence, 1950.) Pp. vi, 216.

Canada, Statutory Orders and Regulations, Consolidation, 1949. Vol. I, A-D. Pp. v, 1,018.

Canada, Proceedings of the 31st Annual Meeting of the Conference of Commissioners on Uniformity of Legislation. Pp. 132.

Cañizares, F. de Sola. *Les Sociétés Commerciales nationales et étrangères en Amérique Latine.* (Recueil Sirey and P. F. A. Cahiers de Législation et de Bibliographie Juridique de l'Amérique Latine, 1950.) Pp. 112.

M. de Sola Cañizares, who is well known to comparative lawyers as permanent liaison officer between Latin America and Europe, has published a most useful set of lectures on Latin American Company Law, a subject on which it is extremely hard to obtain information. As an introduction to this very important subject, with an up-to-date bibliography, it merits the attention of all law librarians. The book is divided into six parts: (1) Introduction; (2) Argentina; (3) Brazil; (4) The remaining Republics of South America; (5) The Republics of Central America and the Antilles; (6) Mexico. Thus the emphasis is on the countries which have taken a leading position in both a legal and a commercial sense; and in relation to these especially there is great deal of practical information.

F. H. L.

Capitant, Henri. *Les Grands Arrêts de la Jurisprudence Civile.* (Paris: Librairie Dalloz, 1950.) Pp. xi, 727.

Casselman, Paul Hubert. *Labour Dictionary*—A concise compendium of labour information. (New York: Philosophical Library, 1949.) Pp. xi, 554. $7.50.

Chalom, Gamil. *La Détermination Fiscale des Bénéfices Commerciaux et Industriels en Égypte et les Recours Contentieux.* (Reprint from Société Fouad Ier D'Economie Politique de Statistique et de Législation, Nos. 254-255, November-December, 1949.)

Cossio, Carlos. *El Derecho en el Derecho Judicial.* (Buenos Aires: Editorial G. Kraft, 1945.) Pp. 252. $12.00.

Cossio, Carlos. *La Coordinacion de las Normas Juridicas y el Problema de la Causa en el Derecho.* (Reprinted from Anales de la Facultad de Ciencias Juridicas, Vol. XVI.)

Criminal Martial Law. (Athens: Hellenic Institute of International Foreign Law, 1940.) Pp. 170.

Current Legal Problems, 1950. Edited by G. W. Keeton and G. Schwarzenberger. (London: Stevens & Sons Ltd., 1950.) Pp. vii, 305. £1 1s.

Denning, Sir Alfred. *Freedom Under the Law.* (London: Stevens & Sons Ltd., 1949.) Pp. viii, 126. 8s.

Discours sur le Code Civil Héllenique. (Athens: Hellenic Institute of International Foreign Law, 1940.) Pp. 31.

Domke, Martin. *Some Aspects of the Protection of American Property Interests Abroad.* (Reprints from Record of the New York Bar Association, Vol. 4, No. 7, October, 1949.)

Effects of Taxation on Foreign Trade and Investment. (New York: U.N.O., 1950.) Pp. 87. 3s. 9d.

Emmet on Title. Thirteenth Edition. Edited by J. Gilchrist Smith. Two volumes. (London: Solicitors' Law Stationery Society Ltd., 1950.) Pp. xxxiii, 620. Pp. cxxvii, 624-1,375. £3 10s.

Eustathiades, C. *Nouvelles tendances en matière d'extradition pour délits politiques.* (Athens: Hellenic Institute of International and Foreign Law, 1939.) Pp. 27.

Eustathiades, C. *The Definition of Ships as "Pirate Ships."* (Athens: Hellenic Institute of International and Foreign Law, 1939.) Pp. 59.

Evaluation of Citizenship Training and Incentive in America Colleges and Universities. (New York: The Citizenship Clearing House, 1950.) Pp. 64.

Evershed, The Rt. Hon. Sir Raymond. *Court of Appeal in England.* (London: The Athlone Press, 1950.) Pp. 32. 2s. 6d.

Falconbridge, John D. *Legitimacy or Legitimation and Succession in the Conflict of Laws.* (Reprint from Canadian Bar Review, 1949.) Vol. 27. Pp. 38.

Grotius' Commentary on the Law of Prize and Booty, Vol. 1. Translation by Gladys L. Williams. Pp. xxxiv, 438. Vol. II. *The Collotype Reproduction.* (Oxford: Clarendon Press (Geoffrey Cumberlege) 1950. £4 4s.

Gusmao, Paulo Dourado de. *Curso de Filosofia do Direito.* (Brazil: Livreria Freitas Bastos S.A., 1950.) Pp. viii, 196.

Gutteridge, H. C. *Comparative Law, Second Edition.* (London: Cambridge University Press, 1949.) Pp. xvi, 214. 15s.

Hayes, Denis. *Challenge of Conscience.* (London: Allen & Unwin Ltd., 1949.) Pp. xvi, 406. 15s.

Historical Survey of the Question of International Criminal Jurisdiction. (New York: United Nations Organization, 1949.) Pp. vii, 147. 7s. 6d. or $1.00.

Hurst, Sir Cecil J. B. *International Law—The Collected Papers.* (London: Stevens & Sons Ltd., 1950.) Pp. ix, 302. £1 10s.

Index to Local and Personal Acts consisting of Classified Lists of the Local and Personal and Private Acts and Special Orders and Special Procedure Orders, 1801-1947. (London: H.M. Stationery Office, 1949.) Pp. viii, 1,140.

India, General Statutory Rules and Orders made under enactments in force in British India. (Delhi: Government of India Press, 1949.) Pp. 306. 13s.

International Law Commission Report. First Session. Pp. 10. 9d. *Second Session.* Pp. 22. 1s. 6d. (New York: United Nations Organization, 1950.)

Institute International "INCIDI"—Record of the XXVth Meeting held in Brussels, November, 1949. (Brussels: INCIDI, 1950.) Pp. lxvi, 324.

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Leeward Islands. Statutory Rules and Orders, 1948. *Acts and Odinances,* 1949.

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Mathew, Sir Theobald. *The Office and Duties of the Director of Public Prosecutions.* (London: Athlone Press, 1950.) Pp. 16. 1s. 6d.

Meek, C. K. *Land Law and Custom in the Colonies.* Second Edition. (Oxford University Press (Geoffrey Cumberlege) 1949.) Pp. xxvi, 337. £1 1s.

Morel, René. *Traité Elémentaire de Procédure Civile.* (Paris: Librairie du Recueil Sirey, 1949.) Pp. x, 606. Francs 1,200.

Nadaraja, T. *The Roman-Dutch Law of Fideicommissa as applied in Ceylon and South Africa.* (Colombo: Associated Newspapers of Ceylon Ltd., 1949.) Pp. xliii, 376.

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Nigeria. Review of the Constitution.

Nuremberg. Le Statut et le Jugement du Tribunal. (New York: United Nations Organization, 1949.) Pp. viii, 108. 75 cents.

Patents Act, 1949. (London: Sweet & Maxwell Ltd., 1950.) Pp. vii, 327. £1 17s. 6d.

Pescio, Victorio. *Manual de Derecho Civil, III.* (Chile: Editorial Juridical, 1950.) Pp. 390.

Perham, Margery. *Colonial Government.* (Oxford University Press (Geoffrey Cumberlege) 1950.) Pp. xvii, 80. 4s. 6d.

Preparatory Study Concerning a Draft Declaration on the Rights and Duties of States (New York: United Nations Organization, 1948.) Pp. vi, 228. $1.50.

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Ramaswamy, M. *The Constitution of the Indian Republic.* (Reprinted from *Canadian Bar Review,* January, 1950.)

Replies from Governments to Questionnaires of the International Law Commission. (New York: United Nations, 1950.) Pp. 120.

Reports of International Arbitral Awards, Vol. III. (New York: United Nations, 1950.) Pp. 1,373-2,231. £2 10s.

Ricca-Barberis, Mario. *La Garanzia per Evizione Nella Dote e Nel Patrimonio Familiare.* (Torino: G. Giappichelli.) Pp. 69. Lire 400.

Rosenow, R. E. G., and Diemont, M. A. *The Rents Act in South Africa.* (Cape Town: Juta & Co., 1950.) Pp. xiii, 206. £1 10s.

Rousselet, Marcel, and Patin, Maurice. *Précis de Droit Pénal Spécial.* (Paris: Librairie du Recueil Sirey, 1950.) Pp. ii, 668. Francs 1,680.

Ruffia, Paolo Biscaretti di. *Diritto Costituzionale,* Vol. II. (Naples: Editrice Eugenio Jovene, 1950.) Pp. xii, 268. Lire 1,100.

Russel on Arbitration. Fourteenth Edition by E. Wetton. (London: Stevens, Sweet & Maxwell, 1949.) Pp. 538.

The general arrangement of this valuable standard work is left as far as possible unaltered by the incorporation in the new edition of the large number of cases decided and of changes in the law effected since the last edition in 1935, close upon the Arbitration Act, 1934. The revised rules (1948) of the London Court of Arbitration are also included.

Schwarzenberger, Georg. *A Manual of International Law.* Second Edition. (London: Stevens & Sons Ltd., 1950.) Pp. lii, 428. £1 5s.

Spiro, Erwin. *Law of Parent and Child.* (Cape Town: Juta & Co., 1950.) Pp. xxxii, 351, £2 17s. 6d.

St. Vincent. Ordinances and Statutory Rules and Orders for 1948.

State Law Index, 1947-1948. Twelfth Biennial Volume. (Washington: U.S. Government Printing Office, 1949.) Pp. vii, 895.

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Study of Statelessness. (New York: United Nations, 1950.) Pp. xiii, 190. 9s.

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